Datuk Zainal Abidin bin Alias & Anor lwn Pendakwa Raya

MAHKAMAH TINGGI (TEMERLOH) — PERMOHONAN JENAYAH NO CB-44–3–09 TAHUN 2022
ROSLAN MAT NOR PK
23 DISEMBER 2022

Undang-Undang Perlembagaan — Undang-undang — Keperlembagaan — Permohonan untuk memutuskan peruntukan s 41B Akta Dadah Berbahaya 1952 ('ADB') adalah bercanggah dengan Perlembagaan Persekutuan ('PP') — Sama ada mahkamah mempunyai bidang kuasa untuk memutuskan isu PP — Sama ada peruntukan di bawah s 41B ADB adalah tidak berperlembagaan — Sama ada mahkamah boleh mempertimbangkan jaminan seperti s 388 Kanun Tatacara Jenayah

Pemohon-pemohon mengemukakan permohonan ini untuk memutuskan sama ada peruntukan bawah s 41B Akta Dadah Berbahaya 1952 ('ADB') adalah berperlembagaan atau sebaliknya. Seksyen 41B ADB memperuntukkan bahawa bagi kesalahan yang tertentu di bawah ADB jaminan tidak boleh ditawarkan kepada tertuduh. Pemohon menegaskan bahawa s 41B ADB telah mengambil bidang kuasa di dalam memutuskan perkara berkaitan dengan jaminan yang telah diputuskan sebagai bidang kuasa kehakiman. Isu-isu untuk pertimbangan adalah: (a) sama ada mahkamah mempunyai bidang kuasa untuk memutuskan isu Perlembagaan Persekutuan ('PP'); (b) sama ada peruntukan di bawah s 41B ADB adalah tidak berperlembagaan; dan (c) sama ada mahkamah boleh mempertimbangkan jaminan seperti s 388 Kanun Tatacara Jenayah ('KTJ').

Diputuskan, menolak notis usul pemohon-pemohon:

(1) Berdasarkan kepada notis usul yang difailkan adalah jelas dan nyata bahawa pemohon-pemohon meminta agar mahkamah memutuskan s 41B ADB adalah tidak selaras (*inconsistent*) dengan PP dan bukannya badan perundangan tidak mempunyai kompetensi atau kelayakan untuk menggubal s 41B ADB. Oleh yang demikian mahkamah mempunyai pilihan untuk memutuskan kes pada peringkat ini ataupun mengemukakan persoalan perlembagaan kepada Mahkamah Persekutuan. Mahkamah memutuskan untuk mendengar permohonan ini disebabkan mahkamah mempunyai bidang kuasa untuk memutuskan notis usul pemohon (lihat perenggan 17–18).

(2) Peruntukan di bawah s 41B ADB tidak menarik kuasa kehakiman atau melanggari peruntukan di bawah perkara 121 PP. Ini adalah disebabkan s 41B ADB telah digubal bagi memperincikan bagaimana mahkamah

perlu menjalankan bidang kuasa kehakiman di dalam memberikan jaminan pada kesalahan-kesalahan yang diperuntukkan bawah s 41B ADB yang tidak dibenarkan untuk diberi jaminan. Seksyen 41B ADB adalah berperlembagaan dan tidak bercanggah dengan perkara 121 PP. Ini adalah disebabkan walaupun kuasa untuk memberikan jaminan adalah satu kuasa kehakiman namun ia diperuntukkan di bawah undang-undang bertulis. Oleh itu, sekiranya undang-undang bertulis tersebut telah memperuntukkan bahawa tiada jaminan boleh diberikan oleh mahkamah seperti dalam s 41B ADB, ia tidak boleh ditafsirkan sebagai menghakis bidang kuasa kehakiman dan bercanggah dengan perkara 121 PP (lihat perenggan 57 & 61–63).

(3) Pindaan s 39B(2A) ADB jelas menunjukkan bahawa setelah seseorang itu disabitkan dengan kesalahan di bawah s 39B(2A) ADB mahkamah boleh semasa menjatuhkan hukuman mempertimbangkan faktor-faktor yang terdapat di bawah s 39B(2A) ADB dengan tidak menjatuhkan hukuman mati sebaliknya menggantikan dengan hukuman yang lain. Oleh itu tiada alasan untuk menyatakan bahawa peruntukan di bawah s 41B ADB adalah bercanggah dengan perkara 8 PP. Selain itu, peruntukan s 41B ADB tidak dapat ditunjukkan oleh pemohon telah melanggar peruntukan perkara 5 PP (lihat perenggan 79–80 & 85).

(4) Terdapat perbezaan di antara s 41B ADB dengan s 388 KTJ. Seksyen 39B dibaca bersama dengan s 41B ADB adalah satu kesalahan tidak boleh jamin (*unbailable*). Sebaliknya kesalahan yang boleh diberikan jaminan di bawah s 388 KTJ adalah kesalahan-kesalahan yang tidak boleh jamin (*non-bailable*). Bagi maksud s 388(1) KTJ sekiranya terdapat keterangan bahawa seseorang itu adalah di bawah 16 tahun atau seorang wanita atau seorang yang sakit atau uzur maka mahkamah boleh mempertimbangkan bagi membenarkan jaminan. Seksyen 41B ADB pula tiada peruntukan proviso seperti dalam s 388(1) KTJ yang bermaksudesalahan-kesalahan yang diperincikan bawah s 41B ADB tidak boleh langsung diberikan jaminan oleh mahkamah. Perbezaan di antara s 41B ADB dengan s 388 KTJ dan s 13 Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 yang mempunyai proviso menyebabkan mahkamah tidak boleh membenarkan jaminan. Bagi pertuduhan di bawah s 39B ADB, s 388 KTJ tidak boleh digunakan dalam mempertimbangkan jaminan dan s 41B ADB mengatasi peruntukan di bawah s 388 KTJ (lihat perenggan 89 & 91).

[English summary

The applicants submitted this application to decide whether the provisions under s 41B of the Dangerous Drugs Act 1952 ('the DDA') were constitutional or otherwise. Section 41B of the DDA provided that bail for certain offences under the DDA could not be offered to the accused. The applicants asserted that s 41B of the DDA had taken jurisdiction in deciding matters related to bail

A that had been decided as judicial jurisdiction. The issues for consideration were: (a) whether court had jurisdiction to decide Federal Constitution ('FC') issues; (b) whether the provision under s 41B of the DDA was unconstitutional; and (c) whether court could consider bail as per s 388 of the Criminal Procedure Code ('the CPC').

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Held, dismissing the applicants' notice of motion:

(1) Based on the notice of motion filed it was clear and obvious that the applicants requested that the court held that s 41B ADB was inconsistent with the FC and not that the Legislature did not have the competence or qualification to enact s 41B of the DDA. Therefore, the court had the option to decide the case at this stage or submit the constitutional question to the Federal Court. The court decided to hear this application because the court had jurisdiction to decide on the applicants' notice of motion (see paras 17–18).

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(2) The provisions under s 41B of the DDA did not take judicial power or violate the provisions under art 121 of the FC. This was because s 41B of the DDA had been enacted to detail how the court had to exercise judicial jurisdiction in granting bail for the offenses provided under s 41B of the DDA that were not allowed to be granted bail. Section 41B of the DDA was constitutional and was not in conflict with art 121 of the FC. This was because although the power to grant bail was a judicial power it was provided under written law. Therefore, if the written law had provided that no bail could be granted by the court as in s 41B of the DDA, it could not be interpreted as eroding judicial jurisdiction and contradicting art 121 of the FC (see paras 61–63).

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(3) The amendment of s 39B(2A) of the DDA clearly indicated that after a person had been convicted of an offense under s 39B(2A) of the DDA the court may, when sentencing, consider the factors found under s 39B(2A) of the DDA by not imposing a sentence death instead of replacing it with another punishment. Therefore, there was no reason to state that the provision under s 41B of the DDA was in conflict with art 8 of the FC. In addition, the provisions of s 41B of the DDA could not be shown by the applicant to have violated the provisions of art 5 of the FC (see paras 79–80 & 85).

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(4) There was a difference between s 41B of the DDA and s 388 of the CPC. Section 39B read together with s 41B of the DDA was an unbailable offence. On the other hand, bailable offenses under s 388 of the CPC were non-bailable offences. For the purpose of s 388(1) of the CPC if there was evidence that a person was under 16 years old or a woman or a person who was sick or infirm then the court could consider granting bail. Section 41B of of the DDA did not have a proviso provision as in s 388(1) of the CPC which meant that the offenses detailed under s 41B

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of DDA could not be immediately granted bail by the court. The difference between s 41B of the DDA with s 388 of the CPC and s 13 of the Security Offences (Special Measures) Act 2012 which had a proviso caused the court to not grant bail. For charges under s 39B of the DDA, s 388 of the CPC could not be used in considering bail and s 41B of the DDA overrode the provisions under s 388 of the CPC (see paras 89 & 91).]

Kes-kes yang dirujuk

Chinnakarappan v PP [1962] 1 MLJ 234 (dirujuk)
Cox v Coleridge (1822) 1 B & C 37 (dirujuk)
Datuk Haji Harun bin Haji Idris v PP [1977] 2 MLJ 155, MP (dirujuk)
Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors [2022] 3 MLJ 356, MP (dirujuk)
Gerald Fernandez v Attorney-General, Malaysia [1970] 1 MLJ 262, MP (dirujuk)
Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors [2018] 3 MLJ 417, MP (diikut)
Government of Malaysia v VR Menon [1990] 1 MLJ 277, MA (dirujuk)
Huddart Parker & Co Pty Ltd & Appleton v Moorehead [1908–1909] 8 CLR 330, MT (dirujuk)
Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor [2021] 2 MLJ 323, MP (dirujuk)
Jimmy Seah Thian Heng & Ors v PP [2019] 7 MLJ 308; [2018] 9 CLJ 769, MT (dirujuk)
Loy Chin Hei v PP [1982] 1 MLJ 31 (dirujuk)
Malaysian Bar & Anor v Government of Malaysia [1987] 2 MLJ 165, MP (dirujuk)
Maria Chin Abdullah v PP [2021] 1 MLJ 750, MP (dirujuk)
Mohd Khairul Azam bin Abdul Aziz v Menteri Pendidikan Malaysia & Anor [2020] 1 MLJ 398, MP (dirujuk)
Ooi Kean Thong & Anor v PP [2006] 3 MLJ 389, MP (dirujuk)
Puan bt Saad v PP [2020] MLJU 1880; [2021] 1 CLJ 121, MT (dibeza)
PP v Chew Siew Luan [1982] 2 MLJ 119, MP (dirujuk)
PP v Dato' Balwant Singh (No 1) [2002] 4 MLJ 427; [2002] 4 CLJ 155, MT (dirujuk)
PP v Dato' Yap Peng [1987] 2 MLJ 311, MT (dirujuk)
PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 (dirujuk)
PP v Khong Teng Khen & Anor [1976] 2 MLJ 166, MP (dirujuk)
PP v Latchemy [1967] 2 MLJ 79 (dirujuk)
PP v Pung Chen Choon [1994] 1 MLJ 566, MA (dirujuk)
PP v Su Liang Yu [1976] 2 MLJ 128 (dirujuk)
Raman a/l Shunmugham lwn Pendakwa Raya [2020] 2 MLJ 675; [2020] 2 CLJ 818, MR (dirujuk)
Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other

A *appeals* [2021] 2 MLJ 822; [2021] 4 CLJ 1, MP (dirujuk)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561; [2017] 5 CLJ 526, MP (dibeza)
Shri Ram Krishna Dalmia and others Versus Shri Justice SR Tendolkar and others (1959) 1 MLJ 67, MA (dirujuk)
B *Tamil Selven a/l Letchumenan v Pendakwa Raya* [2019] MLJU 1123; [2019] 1 LNS 1542, MR (dirujuk)
Wong Shee Kai v Government of Malaysia [2022] 6 MLJ 102, MP (diikut)
Yahya Hussein Mohsen Abdulrab v PP [2021] 5 MLJ 811; [2021] 9 CLJ 414 (diikut)
C

Undang-undang yang dirujuk

Akta Dadah Berbahaya 1952 ss 38B(2A), 39B, 39B(1)(a), (2), (2A), 41B, 41B(1), (1)(a), (1)(b), (1)(c)
D Akta Imigresen 1959/63 s 59A
Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 s 13
Akta Mahkamah Kehakiman 1964
Akta Pencegahan Jenayah 1959
Akta Pengambilan Tanah 1960 s 40D
E Kaedah-Kaedah Mahkamah Persekutuan 1995 k 137
Kanun Tatacara Jenayah ss 388, 388(1), (v), 389, 418A
Perlembagaan Persekutuan perkara 4(3), 5, 8, 121, 121(1), 128, 149

Muhammad Shafee Md Abdullah (Tania Scivetti, Low Zhi Jie, Alaistair Brandah Norman dan Wan Mohammad Arfan Wan Othman bersamanya) (Shafee & Co) bagi pihak pemohon-pemohon.
F *Abdul Ghafar Ab Latif (Ain-Nur'Amiyerra Awod Abdullah bersamanya) bagi pihak responden.*

G **Roslan Mat Nor PK:**

PENDAHULUAN

[1] Pemohon-pemohon mengemukakan permohonan di mahkamah ini
H untuk memutuskan sama ada peruntukan di bawah s 41B Akta Dadah Berbahaya 1952 (ADB) adalah berperlembagaan atau sebaliknya. Seksyen 41B ADB 1952 memperuntukkan bahawa bagi kesalahan yang tertentu di bawah ADB 1952 jaminan tidak boleh ditawarkan kepada tertuduh. Seksyen 41B ADB 1952 memperuntukkan seperti berikut:

I 41B No bail to be granted in respect of certain offences

(1) Bail shall not be granted to an accused person charged with an offence under this Act —

(a) where the offence is punishable with death; or

(b) where the offence is punishable with imprisonment for more than five years; or

(c) where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person.

(2) Subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary.

[2] Seksyen ini telah diperkenalkan ke dalam ADB 1952 berkuat kuasa pada 10 Mac 1978. Ia memperuntukkan bahawa tiada sebarang perintah atau tawaran jaminan boleh diberikan kepada tertuduh yang dituduh di bawah kategori (a), (b) dan (c).

[3] Mahkamah Persekutuan dalam kes *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119 telah menjelaskan kedudukan s 41B ADB 1952 tersebut seperti berikut:

> We further note in particular that section 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act, 1978 (Act A426) and became operative on 10 March 1978. *Generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law. (See also *Public Prosecutor v Chu Beow Hin* [1982] 1 MLJ 135 137). The provisions of s 3 of the Criminal Procedure Code which counsel for the respondent seeks to rely on has no relevance whatsoever to the matter in issue before us.
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> It would be erroneous to apply expressions used and provisions made in one statute to another and entirely different one in complete disregard of the latter's express stipulations in the light of its specific purpose and object. On the other hand, it is a sound, and, indeed, a well-known principle of construction of a statute that the purport of words and expressions used in a legislative measure must take their colour from the context in which they appear. We do not therefore agree with the learned judge that it is open to a court to subject the express provisions regarding bail in s 41B of the Dangerous Drugs Act to the provisions relating thereto in the Criminal Procedure Code. The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must *ex necessitate* yield to the specific provisions of s 41B of the Dangerous Drugs Act in that regard. We should perhaps also observe en passant that any other construction would result in nullifying the purport and effect of the provisions of s 41B(1)(c) of the Dangerous Drugs Act and render otiose and ineffective a certificate of the public prosecutor thereunder that it is not in the public interest to grant bail to a person accused of an offence under the Dangerous Drugs Act punishable with imprisonment for five years or less.

[4] Hakikat s 41B ADB 1952 juga telah dinyatakan dalam kes *Loy Chin Hei*

v Public Prosecutor [1982] 1 MLJ 31 di mana Hakim Wan Yahya membincangkan hubung kait di antara ss 388–389 Kanun Tatacara Jenayah ('KTJ') dengan s 41B ADB 1952 dengan menyatakan seperti berikut:

> The discretion as generally given by ss 388, 389 and 394 of the Criminal Procedure Code has been effectively taken away from the courts, both the Subordinate and High Courts, by s 41B of the Dangerous Drugs Act. Disconcerting as it may be for us to witness the power of the courts, especially those relating to the liberty of the subject who is accused but yet to be proven guilty, being gradually whittled away by statute, yet when Parliament has expressed in unequivocal language its intention to curtail this discretionary power, the courts are not free to question its wisdom in providing for a deterrent procedure for an obviously baneful mischief to society, but must interpret and give effect to the law as it stands.
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> The restriction on bail under s 41B of the Dangerous Drugs Act is absolute. Neither the courts below, nor this court, now possess the power to admit to bail any person charged thereunder with any offence punishable with death or more than five years' imprisonment, or even for lesser terms when the public prosecutor certifies that it is against public interest to allow bail.

PERMOHONAN INI

[5] Namun demikian permohonan di hadapan mahkamah ini sekarang ialah berkaitan sama ada peruntukan di bawah s 41B ADB 1952 tersebut adalah bercanggah dengan Perlembagaan Persekutuan dan bukannya sama ada mahkamah ini mempunyai bidang kuasa untuk memberikan jaminan di bawah s 41B ADB 1952 yang pada hemat mahkamah telah jelas kedudukan undang-undangnya di dalam keputusan-keputusan mahkamah atasan yang tidak boleh diganggu gugat lagi. Di dalam kes ini isu berperlembagaan timbul berkenaan s 41B ADB 1952 dan bukannya isu berkenaan sama ada peruntukan di bawah s 41B ADB 1952 perlu diutamakan daripada peruntukan s 388 KTJ.

[6] Oleh itu isu di dalam kes ini ialah:

(a) adakah mahkamah ini mempunyai bidang kuasa untuk memutuskan isu Perlembagaan Persekutuan?

(b) adakah peruntukan di bawah s 41B ADB 1952 adalah sesuatu yang tidak berperlembagaan? dan

(c) adakah pemohon boleh diberikan jaminan?

Adakah mahkamah ini mempunyai bidang kuasa untuk memutuskan isu Perlembagaan Persekutuan?

[7] Adalah tidak dapat dinafikan bahawa bidang kuasa untuk mendengar kes yang melibatkan pentafsiran Perlembagaan Persekutuan telah dinyatakan

di bawah perkara 128 Perlembagaan Persekutuan seperti berikut:

128 Bidang kuasa Mahkamah Persekutuan

(1) Hanya Mahkamah Persekutuan sahaja, dan tidak mana-mana mahkamah lain, mempunyai bidang kuasa bagi memutuskan mengikut mana-mana kaedah mahkamah yang mengawal selia penjalanan bidang kuasa sedemikian—

(a) apa-apa soal sama ada sesuatu undang-undang yang dibuat oleh Parlimen atau Badan Perundangan sesuatu Negeri adalah tidak sah atas alasan bahawa undang-undang itu membuat peruntukan mengenai sesuatu perkara yang mengenainya Parlimen atau, mengikut mana-mana yang berkenaan, Badan Perundangan Negeri itu tidak mempunyai kuasa untuk membuat undang-undang; dan

(b) pertikaian atas apa-apa soal lain antara Negeri dengan Negeri atau antara Persekutuan dengan mana-mana Negeri.

(2) Tanpa menjejaskan apa-apa bidang kuasa rayuan Mahkamah Persekutuan, jika dalam mana-mana prosiding di hadapan suatu mahkamah lain suatu soal berbangkit tentang kesan mana-mana peruntukan Perlembagaan ini, Mahkamah Persekutuan mempunyai bidang kuasa (tertakluk kepada mana-mana kaedah mahkamah yang mengawal selia penjalanan bidang kuasa itu) untuk memutuskan soal itu dan menghantar balik kes itu kepada mahkamah yang satu lagi untuk dibereskan mengikut keputusan itu.

(3) Bidang kuasa Mahkamah Persekutuan untuk memutuskan rayuan dari Mahkamah Rayuan, Mahkamah Tinggi atau seseorang hakim Mahkamah itu hendaklah sebagaimana yang diperuntukkan oleh undang-undang persekutuan.

[8] Perkara 4(3) Perlembagaan Persekutuan menyatakan seperti berikut:

Undang-undang utama Persekutuan

(3) Kesahan mana-mana undang-undang yang dibuat oleh Parlimen atau Badan Perundangan mana-mana Negeri tidak boleh dipersoalkan atas alasan bahawa undang-undang itu membuat peruntukan berkenaan dengan apa-apa perkara yang berkenaan dengannya Parlimen atau, mengikut mana-mana yang berkenaan, Badan Perundangan Negeri itu tidak mempunyai kuasa untuk membuat undang-undang, kecuali dalam prosiding untuk mendapatkan suatu penetapan bahawa undang-undang itu adalah tidak sah atas alasan itu atau —

(a) jika undang-undang itu telah dibuat oleh Parlimen, dalam prosiding antara Persekutuan dengan satu atau beberapa Negeri;

(b) jika undang-undang itu telah dibuat oleh Badan Perundangan sesuatu Negeri, dalam prosiding antara Persekutuan dengan Negeri itu.

[9] Ia seolah-olah menunjukkan bahawa isu-isu berkenaan dengan Perlembagaan harus diputuskan oleh Mahkamah Persekutuan di bawah

bidang kuasa asal Mahkamah Persekutuan. Namun demikian di dalam Akta Mahkamah Kehakiman 1964 (Akta 91) terdapat peruntukan s 84 yang menyatakan seperti berikut dalam teks asalnya:

> 84 Reference of constitutional question by High Court
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> (1) Where in any proceedings in the High Court a question arises as to the effect of any provision of Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.
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> (2) An order staying proceedings under this section may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may see fit having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final determination of the proceedings.
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> (3) Where an order for stay of proceedings has been made under this section the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case which so far as may be possible shall state the said question in a form which shall permit of an answer being given in the affirmative or the negative.
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> (4) Where a Judge shall have stated a special case under this section the same shall be transmitted to the Federal Court in accordance with the rules of court of the Federal Court.

[10] Persoalannya ialah, adakah mahkamah ini mempunyai bidang kuasa bagi mendengar permohonan ini yang menyentuh kepada isu yang berkaitan dengan perlembagaan. Dalam hal ini mahkamah merujuk kepada keputusan Mahkamah Persekutuan di dalam kes *Gerald Fernandez v Attorney-General, Malaysia* [1970] 1 MLJ 262:

> Probably the learned Chief Justice was misled by being referred to an unamended copy of s 48(1) of the Courts of Judicature Act No 7 of 1964 which originally read:
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> > Where in any proceedings in any High Court a question arises as to the effect of any provision of the Constitution the judge hearing such proceedings shall stay the same on such terms as may be just to await the decision of such question by the Federal Court.
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> Note well the mandatory word underlined. The appellant's solicitors in their written submission to us repeated the above text, but the word '*shall*' has been amended by Act No 35 of 1964 to read 'may'. So it is quite plain that the High Court has jurisdiction. But even without the amendment the High Court would be competent to give a ruling on this question, for the original text of section 48(1) of the Courts of Judicature Act was clearly inconsistent with the Constitution, the general scheme of which is to empower the High Court (subject to certain restrictions) to pronounce on the constitutionality of Federal and State laws.

[11] Ini telah ditegaskan seterusnya oleh Mahkamah Persekutuan di dalam kes *Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* [2018] 3 MLJ 417 seperti berikut:

> [35] Challenges to the validity of legislation on grounds other than the specific ground in arts 4(4) and 128(1)(a) are available to all litigants in all proceedings (KC Vohrah, PTN Koh, PS WLing (eds), *Sheridan & Groves The Constitution of Malaysia* (5th Ed, Kuala Lumpur: *Malayan Law Journal*, 2004) at p 46). The High Court is competent to hear such challenges, for the general scheme of the Federal Constitution is to empower the High Court to pronounce on the constitutionality of federal and state laws (*Gerald Fernandez v Attorney-General, Malaysia* [1970] 1 MLJ 262 at p 264).
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> [36] It bears emphasis and repetition that not all matters of constitutionality come under the exclusive jurisdiction of the Federal Court. The Federal Court is not a constitutional court, but the final arbiter on the meaning of constitutional provisions (*A Harding, Law, Government and the Constitution in Malaysia (Kuala Lumpur, Malayan Law Journal*: 1996) at p 138). All courts, not just the Federal Court, have the power to interpret the Constitution (per Tun M Suffian, *The Judiciary — During the First Twenty Years of Independence in Tun M Suffian, HP Lee, FA Trinidade* (eds), *The Constitution of Malaysia, Its Development: 1957–1977* (Kuala Lumpur, Oxford University Press: 1978) at p 237). Only challenges as to the competence of the legislative body to enact a law fall within the original jurisdiction of the Federal Court; all other grounds of challenge to the constitutional validity of a law are within the jurisdiction of the High Court.
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> [37] While s 84 of the Courts of Judicature Act 1964 allows the High Court to refer questions regarding the effect of any provision of the Constitution to the Federal Court, the High Court is not obliged to do so and may dispose of the questions (*Tan Sri Mohamed Suffian bin Hashim, An Introduction to the Constitution of Malaysia* (Kuala Lumpur: Jabatan Chetak Kerajaan, 1972) at p 96; *Hashim bin Saud v Yahaya bin Hashim & Anor* [1973] 2 MLJ 85 at p 85). Indeed, this court has expressed a preference for the High Court to determine [2018] 3 MLJ 417 at p 434 constitutional questions itself in *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120 at pp 123–124:
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> > Secondly, we would observe that *it would have been better if the learned judge had not referred this matter to us but instead had himself decided the constitutional questions which arose (he had jurisdiction to do so: Fernandez v Attorney-General* [1970] 1 MLJ 262 at p 264) and decided the case one way or the other. If he had done that and there were an appeal to us, the whole matter would have been disposed of in two steps.
> >
> > By referring this matter to us without deciding it one way or another, should there be an appeal from his decision on the charge, this matter would come back to us a second time, and thus will have to be disposed of in four steps: causing delay and additional expense, instead of helping in the words of s 48(2) of the Courts of Judicature Act, towards the speedy and economical final determination of these proceedings. (Emphasis added.)
>
> [38] As such, it is clear that arts 4(3), 4(4) and 128(1)(a) do not apply to challenges to the validity of legislation on any other ground than where a legislative body has

made law on matters beyond its legislative competence. These other grounds include challenges on the basis that the law is inconsistent with certain provisions in the Federal or State Constitution, and that a State Enactment is inconsistent with Federal law. Challenges on other grounds are not subject to any of the restrictions above, and the High Court has jurisdiction to determine the matter.

[12] Mahkamah Persekutuan juga telah menjelaskan perbezaan di antara pertikaian berkenaan keesahan undang-undang disebabkan badan perundangan tidak mempunyai kuasa untuk meluluskan undang-undang dengan pertikaian berkenaan peruntukan undang-undang bertulis yang bercanggah dengan Perlembagaan Persekutuan adalah dua perkara yang berbeza. Sekiranya ia melibatkan bidang kuasa badan perundangan menggubal undang-undang yang tidak diperuntukkan dalam Perlembagaan ia adalah di bawah bidang kuasa Mahkamah Persekutuan. Sebaliknya sekiranya ia adalah melibatkan percanggahan peruntukan undang-undang bertulis dengan Perlembagaan ia boleh diselesaikan oleh Mahkamah Tinggi. Ini dinyatakan dalam kes *Wong Shee Kai v Government of Malaysia* [2022] 6 MLJ 102 seperti berikut:

> [26] Thus, for ease of reference, any challenge that requires leave under art 4(3) of the FC is called an 'incompetency' challenge while all other challenges that can be brought before the High Court are called 'inconsistency challenges' even though the result of both might be that under art 4(1) the impugned provision of law is inconsistent with the Federal Constitution.
>
> [27] To cite some examples, in a typical 'incompetency' challenge, there is an allegation that the State Legislature made a law which falls within the Federal List, or Parliament made a law which falls within the State List and is not supported by the Concurrent List, or that any Legislature (Federal or State) made a law which is not expressly sanctioned by any of the Legislative Lists in the Ninth Schedule of the FC. In short, the impugned law is invalid because the Legislature simply has no power to make it. This is unique to our FC because under art 4(1), it is the FC that is supreme and not Parliament or any of the State Legislatures. These legislative bodies are limited by the FC in the types of laws they are entitled to make. These are the challenges contemplated by art 4(3) which fall under the original jurisdiction of the Federal Court under art 128(1). The use of the phrase 'incompetency' challenge is merely for easy reference in practice.
>
> [28] Any other challenge which alleges that a particular provision of law is invalid because it is inconsistent with the Federal Constitution — usually Part II — is not caught by art 4(3) and must be brought in the first instance, to the High Court. It is in this sense that such challenges are called 'inconsistency' if considered against 'incompetency' challenges.
>
> [29] Thus, all 'incompetency' challenges are, in their broader sense, 'inconsistency' challenges, but not all 'inconsistency' challenges are 'incompetency' challenges. An 'inconsistency' challenge, being the larger concept, is incapable of being converted into the narrower concept of an 'incompetency' challenge. In other words, one cannot allege, for example, that a law is in violation of art 5 of the FC and since it

is null and void premised on that inconsistency, Parliament or the State Legislature (as the case may be) is not empowered to make it. If that were the case, then there would be no reason for art 4(3) of the FC to specifically single out cases where allegations are made that the relevant Legislature had no power to make the law from all other types of challenges of constitutional validity.

...

[34] To summarise, any 'incompetency' challenge encompasses a situation where Parliament or the State Legislature is not in the first place, empowered to even enact the impugned law. It would not strictly matter in those circumstances whether the law exceeds other restrictions or conditions imposed by the Federal Constitution because the scrutiny in an 'incompetency' challenge is to ascertain the source of the power to make that law with the view to seeking declaratory relief to the effect that the relevant Legislature (Federal or State) had no power to make that law.

[13] Mahkamah ini juga dipandu arah oleh Mahkamah Persekutuan dalam kes *Wong Shee Kai* tersebut mengenai apakah tindakan yang boleh diambil oleh mahkamah apabila adanya persoalan Perlembagaan Persekutuan dikemukakan di Mahkamah Tinggi. Panduan tersebut dapat dilihat seperti berikut:

[18] The other point is this. As many of the recent judgments of this court have clarified, art 4 of the FC must be read in harmony with art 121 of the same. The judicial power of the Federation is vested in the two High Courts and it must follow that where constitutional issues can be raised before the High Court, they ought to be so raised there as being the first court in the judicial hierarchy to be entrusted with such powers. Ignoring that and allowing cases to come directly to the Federal Court is to ignore our very own constitutional design. After all, even constitutional references must be initiated in the High Court, which court retains the discretion to decide whether to hear the constitutional challenge or to transmit them to the Federal Court under ss 84 and 85 of the CJA 1964.

[14] Adalah didapati contoh di mana pertikaian berkenaan dengan badan perundangan mempunyai bidang kuasa untuk menggubal satu undang-undang yang bercanggah dengan Perlembagaan Persekutuan dapat dilihat dalam kes *Mohd Khairul Azam bin Abdul Aziz v Menteri Pendidikan Malaysia & Anor* [2020] 1 MLJ 398.

[15] Dalam kes *Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 323 Mahkamah Persekutuan menjelaskan perbezaan di antara cabaran tiada kompetensi atau ketidaklayakan (*incompentency*) atau ketidakselarasan (*inconsistency*) seperti berikut:

[29] In this regard, the phrases 'inconsistency challenge' and 'incompetency challenge' are purely convenient nomenclature serving as a means to identify the procedure to mount the different challenges given their nature. As identified earlier, the High Courts have jurisdiction to hear inconsistency challenges while incompetency challenges are reserved for the original jurisdiction of the Federal

Court. The original jurisdiction of this court is exclusive simply because of the gravity of the allegation that the relevant legislature has no power to make that law. This is clearly suggested by Suffian LP in *Ah Thian* at p 113, as follows:

> This jurisdiction is exclusive to the Federal Court, no other court has it. This is to ensure that a law may be declared invalid on this very serious ground only after full consideration by the highest court in the land.

[16] Bagi memastikan sama ada cabaran yang dikemukakan oleh pemohon-pemohon dalam kes ini adakah berkaitan dengan cabaran tiada kompetensi atau ketidaklayakan (*incompentency*) atau ketidakselarasan (*inconsistency*) mahkamah perlu meneliti kepada permohonan ini secara terperinci. Di dalam notis usul yang dikemukakan telah dinyatakan persoalan yang ingin mahkamah ini putuskan iaitu di Lampiran A notis usul tersebut seperti berikut:

(a) memandangkan mahkamah kini mempunyai kuasa budi bicara dalam menjatuhkan hukuman mati atau penjara seumur hidup berdasarkan pindaan kepada s 39B(2) Akta Dadah Berbahaya 1952 dan berikutan pemasukan s 38B(2A) Akta Dadah Berbahaya 1952, sama ada rampasan kuasa kehakiman yang jelas dalam s 41B(1) Akta Dadah Berbahaya 1952 untuk menafikan jaminan dalam apa jua keadaan adalah ultra vires perkara 121 Perlembagaan Persekutuan?

(b) memandangkan mahkamah kini mempunyai kuasa budi bicara dalam menjatuhkan hukuman mati atau penjara seumur hidup berdasarkan pindaan kepada s 39B(2) Akta Dadah Berbahaya 1952 dan berikutan pemasukan s 39B(2A) Akta Dadah Berbahaya 1952, sama ada rampasan kuasa kehakiman yang jelas dalam s 41B(1) Akta Dadah Berbahaya 1952 untuk menafikan ikat jamin, dalam apa jua keadaan, adalah ultra vires perkara 5 dan 8 Perlembagaan Persekutuan?

[17] Berdasarkan kepada notis usul yang difailkan tersebut adalah jelas dan nyata bahawa pemohon-pemohon meminta agar mahkamah ini memutuskan s 41B ADB 1952 itu adalah tidak selaras (*inconsistent*) dengan Perlembagaan Persekutuan dan bukannya badan perundangan tidak mempunyai kompetensi atau kelayakan untuk menggubal s 41B ADB 1952 tersebut. Oleh yang demikian mahkamah berpendapat mahkamah ini mempunyai pilihan untuk memutuskan kes ini pada peringkat ini ataupun mengemukakan persoalan perlembagaan ini kepada Mahkamah Persekutuan. Ia sejajar dengan apa yang diputuskan dalam kes *Gin Poh Holdings Sdn Bhd* dan *Wong Shee Kai*.

[18] Dalam kes ini mahkamah memutuskan untuk mendengar permohonan ini disebabkan pada hemat mahkamah, mahkamah ini mempunyai bidang kuasa untuk memutuskan notis usul pihak pemohon.

Adakah s 41 ADB 1952 tidak selaras dengan Perlembagaan Persekutuan? A

[19] Jika diteliti kepada isi kandungan notis usul, pihak pemohon juga memohon agar mahkamah menggunakan budi bicara di bawah s 388(1) KTJ untuk mempertimbangkan jaminan sekiranya mahkamah memutuskan bahawa s 41B ADB 1952 itu tidak berperlembagaan. B

[20] Permohonan ini dibuat disebabkan terdapatnya pindaan kepada s 39B ADB 1952 iaitu dimasukkan s 39B(2A) yang berkuat kuasa pada 15 Mac 2018 melalui [PU(B) 127/2018] yang menyatakan seperti berikut: C

> 39B Trafficking in dangerous drug
>
> (2A) In exercising the power conferred by subsection (2), the Court in imposing the sentence of imprisonment for life and whipping of not less than fifteen strokes, may have regard only to the following circumstances:
>
> (a) there was no evidence of buying and selling of a dangerous drug at the time when the person convicted was arresed; D
>
> (b) there was no involvement of agent provocateur; or
>
> (c) the involvement of the person convicted is restricted to transporting, carrying, sending or delivering a dangerous drug; and E
>
> (d) that the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.

[21] Seksyen 39B(2A) ADB 1952 dimasukkan melalui pindaan kepada s 39B ADB 1952 yang dibentangkan untuk bacaan kali kedua di Dewan Rakyat pada 30 November 2017. Pindaan tersebut telah dijelaskan oleh YB Menteri di Jabatan Perdana Menteri Dato' Sri Azalina Dato' Othman Said seperti berikut: F

> Secara seluruhnya Tuan Yang di-Pertua, Rang Undang-undang Dadah Berbahaya (Pindaan) 2017 ini mempunyai tiga fasal seperti berikut. Fasal 1 mengenai tajuk ringkas dan peruntukan mengenai permulaan kuat kuasa. Fasal 2 bertujuan untuk meminda seksyen 39B Akta 234 seperti yang berikut: (i) dengan menggantikan subseksyen (2) sedia ada dengan subseksyen (2) yang baru bagi memasukkan hukuman selain daripada hukuman mati mandatori bagi kesalahan mengedar dadah berbahaya iaitu hukuman seumur hidup dan sebatan tidak kurang daripada 15 kali sebat; dan (ii) memasukkan subseksyen (2A), (2B), (2C) baru antara lain bagi menyatakan hal keadaan tertentu yang hanya boleh diambil kira oleh mahkamah. Untuk makluman Ahli-ahli Yang Berhormat, kerajaan juga akan melakukan satu pindaan berperingkat di peringkat Jawatankuasa terhadap perenggan-perenggan seksyen 39B(2A)(d), (2B) dan (2C) yang dicadangkan untuk memberikan kuasa budi bicara sepenuhnya kepada mahkamah, termasuk untuk menentukan orang yang disabit telah membantu agensi penguatkuasaan dalam mengendalikan aktiviti pengedaran dadah di dalam atau di luar Malaysia. Cadangan pindaan ini adalah dengan mengambil kira pandangan dan cadangan G H I

ahli-ahli berkepentingan yang telah dikemukakan kepada kerajaan. Pindaan ini menunjukkan keterbukaan kerajaan khususnya Yang Amat Berhormat Dato' Seri Mohd Najib bin Tun Abdul Razak, Perdana Menteri Malaysia yang sentiasa mendengar pandangan pelbagai pihak untuk memastikan setiap keputusan dasar dibuat secara inklusif.

[22] Penelitian kepada Penyata Rasmi Parlimen (*Hansard*) juga menunjukkan bahawa terdapat pindaan kepada Rang Undang-undang tersebut di peringkat Jawatankuasa Dewan Rakyat yang terdapat di ms 95 seperti berikut:

> Menteri di Jabatan Perdana Menteri [Dato' Sri Azalina Dato' Othman Said]: Tuan Pengerusi, sub fasal 2(b) rang undang-undang ini akan memasukkan subseksyen 39B(2A), (2B) dan (2C) ke dalam Akta Ibu dipinda: (a) dalam perenggan 39B(2A)(d) yang dicadangkan dengan menggantikan perkataan 'the Public Prosecutor certifies in writing to the court that in his determination', dengan perkataan 'that'; (b) dengan memotong subseksyen 39B(2B); (c) dengan menomborkan semula subseksyen 39B(2C) sebagai subseksyen 39B(2B); dan (d) dalam perenggan 39B(2B) yang dinomborkan semula, dengan menggantikan perkataan 'For the purposes of subsection (2A) and (2B)', dengan perkataan 'For the purposes of subsection (2A). Pindaan kepada subfasal 2(b) rang undang-undang bertujuan untuk meniadakan perakuan daripada pendakwa raya tentang bantuan yang diberikan oleh orang yang disabitkan.

[23] Apa yang jelas daripada pindaan tersebut ialah ia hanya berkaitan dengan s 39B ADB 1952. Di dalam Rang Undang-Undang Pindaan tersebut iaitu DR 45/2017 tiada sebarang petunjuk yang menyatakan bahawa s 41B tersebut telah dipinda untuk menyesuaikan dengan pindaan s 39B(2A) ADB 1952 tersebut. Oleh yang demikian mahkamah menghargai permohonan pihak pemohon dalam kes ini untuk satu penentuan sama ada s 41B ADB 1952 tersebut berperlembagaan. Ini adalah disebabkan semasa s 41B itu dimasukkan dalam ADB 1952 hukuman di bawah s 39B itu adalah hukuman mandatori mati. Sebaliknya, kini mahkamah mempunyai bidang kuasa untuk mempertimbangkan hukuman selain daripada hukuman mati setelah berpuas hati dengan syarat-syarat yang perlu dipenuhi. Apakah kewujudan s 41B ADB 1952 selepas daripada pindaan kepada s 39B dengan memasukkan (2A) tersebut menjadikan s 41B itu berperlembagaan atau sebaliknya?

[24] Ini adalah isu yang perlu diputuskan oleh mahkamah. Pada masa yang sama mahkamah juga perlu meneliti prinsip-prinsip yang diputuskan oleh mahkamah atasan berkenaan tatacara untuk memutuskan sama ada sesuatu undang-undang tersebut adalah berperlembagaan. Salah satu daripada prinsip asas di dalam pentafsiran undang-undang bagi menentukan sama ada ianya bercanggah dengan perlembagaan ialah anggapan bahawa undang-undang statut adalah sah di sisi perlembagaan (*presumption of the constitutional validity of statute*). Ia membawa maksud undang-undang yang diluluskan adalah

dianggap sebagai berperlembagaan. Ini telah dinyatakan di dalam kes *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 seperti berikut:

> First of all, it is clear law that there is a presumption — perhaps even a strong presumption — of the constitutional validity of the impugned section and so the burden of proof lies on the party seeking to establish the contrary (see *Public Prosecutor v Datuk Harun bin Haji Idris & Ors*).

[25] Dalam kes *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116, Hakim Abdoolcader menyatakan seperti berikut:

> 2. Principles in considering the challenge to the constitutional validity of the impugned section.
>
> In considering the matter in issue the principles to be borne in mind are three-fold:
>
> Firstly, there is a presumption — perhaps even a strong presumption — of the constitutional validity of the impugned section with the burden of proof on whoever alleges otherwise.
>
> Secondly, the presumption is not however to be carried to the extent or stretched for the purpose of validating an otherwise invalid law, and if the force of Article 8(1) bears sufficiently strongly upon and against that presumption, it must then necessarily bend, break and give way under that force.
>
> And thirdly, for this purpose a statute or statutory provision must be examined on its own merits and not by comparison with other similar provisions (State of *Madhya Pradesh v GC Mandawar* AIR 1954 SC 493).

[26] Dalam kes *Ooi Kean Thong & Anor v Public Prosecutor* [2006] 3 MLJ 389 dinyatakan seperti berikut:

> [16] In the area of public law and in particular administrative law, there are judicial pronouncements, local and foreign, which provide for the grounds to rely upon in relation to judicial control of subsidiary legislation. One such ground is whether the parent act or the subsidiary legislation is constitutional or in conformity with the provisions of the Constitution. If it infringes the Constitution itself or any constitutional provision then it is struck down for that reason. But it has to be borne in mind that the courts have been consistently applying the presumption of constitutionality in favour of impugned statutory provision and to succeed the onus is therefore on the party asserting otherwise to show (see *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566; *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128).

[27] Dalam kes *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128 Hakim Hashim Yeop Sani setelah meneliti keputusan keputusan daripada Amerika Syarikat dan Mahkamah Agong India telah merumuskan perkara-perkara yang perlu dipertimbangkan apabila sesuatu undang-undang bertulis itu dicabar berkenaan percanggahan dengan Perlembagaan beliau telah merumuskan seperti berikut:

Therefore whatever may be said of the United States and Indian Supreme Court decisions cited by both parties the following propositions still make good law:

(1) When a law is challenged as infringing the Article, it is necessary for the court first of all to ascertain the policy and object of the statute concerned.

(2) Having ascertained the policy and object the court thenif it is a special law examine whether there is reasonable classification.

(3) The reasonableness of the classification should be tested with reference to the circumstances existing at the time of the enactment of the statute.

(4) Procedural statutes are equally subject to the constitutional limitation as substantive laws unless the change in procedure is purely technical or formal.

(5) In the absence of a reasonable classification, substantial departures from the ordinary law of procedure in a criminal trial would offend against the Article but not minor changes which do not really prejudice the accused. In order to find out whether there has been a substantial departure from normal procedure, the test to be applied is not the degree of inequality, but the reality of it. There is no question of law being discriminatory unless it empowers the administrative authority, in its discretion, to impose a more onerous procedure than the ordinary one.

(6) A legislation which does not contain any provision which is directly discriminatory may yet offend against the guarantee of equal protection if it confers upon the executive or administrative authority an unguided and uncontrolled discretionary power in the application of the law.

(7) There is always a presumption in favour of constitutionality of an enactment and the burden is upon him who attacks the enactment to show that there has been a clear transgression of the constitutional principles.

(8) It must be presumed that the legislature understands and correctly appreciates the need of its own people and that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds provided however that while good faith and knowledge of the existing conditions on the part of the legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of holding that there must be some undisclosed and unknown reasons for the discrimination.

(9) Whether a particular piece of legislation is discriminatory should be determined in each case as it arises and no general rule can safely be laid down.

(10) Finally on the presumption of constitutionality a legislation is not to be struck down as discriminatory if any state of facts may reasonably be conceived to justify it. In order to sustain the presumption of

constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived as existing at the time of the legislation.

[28] Jika diteliti kepada perkembangan prinsip 'presumption of the constitutional validity of statute' ia dibincangkan oleh Mahkamah Agong di India. Ini dapat dilihat dalam kes *Shri Ram Krishna Dalmia and others Versus Shri Justice SR Tendolkar and others* (1959) 1 MLJ 67 (Madras Law Journal) (SC) di mana Ketua Hakim Das CJ menyatakan seperti berikut:

The principle enunciated above has been consistently adopted and applied in subsequent cases. The decisions of this Court further establish:

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

[29] Mahkamah ini juga meneliti perbincangan berkenaan prinsip ini di dalam artikel yang bertajuk *Constitutional Validity of Statute: Sedition Act 1948* [2022] 4 MLJ cciii oleh Awang Armadajaya Awang Mahmud dan Prof Dato' Sri Dr Ashgar Ali Ali Mohamed yang menyatakan seperti berikut:

PRESUMPTION ON CONSTITUTIONAL VALIDITY OF STATUTE

A Furthermore, whenever there is any challenge on the constitutionality of the laws enacted by the legislature, an essential keystone in such an action is that in law, there is always a presumption in favour of constitutionality of any legislation under attack. In other words, the principle in law is that the constitutionality of a law is presumed and it is incumbent upon a party that alleges otherwise to prove it.

B

[30] Oleh yang demikian di dalam kes ini mahkamah perlu melihat sama ada terdapat alasan yang dikemukakan oleh pihak pemohon bagi menyanggah anggapan keesahan Perlembagaan s 41B ADB 1952 tersebut. Mahkamah meneliti afidavit sokongan yang difailkan bagi menyokong alasan permohonan ini. Ia dapat dilihat di afidavit pemohon (KM3) Datuk Zainal Abidin bin Alias di perenggan 22–23 seperti berikut:

C

22. Sorotan daripada Pindaan dan memandangkan bahawa Seksyen 13 SOSMA telah dianggap tidak berperlembagaan oleh Mahkamah, keperlembagaan Seksyen 41B(1) Akta Dadah Berbahaya 1952 yang secara tidak munasabah menyekat ikat jamin, telah menjadi suatu persoalan dan saya dinasihatkan oleh peguamcara-peguamcara saya dan sesungguhnya percaya bahawa Seksyen 41B(1) Akta Dadah Berbahaya 1952 yang mempunyai perkataan yang serupa hendaklah dianggap sebagai tidak berperlembagaan. Dalam hal ini:-

D

E

22.1 Saya dinasihatkan oleh peguamcara-peguamcara saya dan benar-benar percaya bahawa Mahkamah Yang Mulia ini mempunyai kuasa inheren di bawah Perkara 121 Perlembagaan Persekutuan untuk memberikan atau menolak ikat jamin sementara menunggu perbicaraan.

F

22.2 Oleh itu saya dinasihatkan oleh peguamcara-peguamcara saya dan dengan sesungguhnya menyatakan bahawa Seksyen 41B Akta Dadah Berbahaya telah melanggar Perkara 121 Perlembagaan Persekutuan kerana telah merampas kuasa Mahkamah untuk mempertimbangkan ikat jamin bagi kesalahan di bawah Akta Dadah Berbahaya 1952.

G

23. Saya benar-benar percaya bahawa penentuan isu-isu perlembagaan yang disebut di atas adalah penting dan mempengaruhi perbicaraan yang melibatkan saya, kerana keputusan permohonan ini akan memberi kesan sekiranya Seksyen 41B Akta Dadah Berbahaya 1952 diisytiharkan tidak berperlembagaan.

H

[31] Sebaliknya dalam afidavit jawapan (KM9) responden di perenggan 11 menyatakan seperti berikut:

11. Oleh itu menyatakan bahawa berdasarkan peruntukan Seksyen 41B(1)(a) ADB 1952 tersebut jelas memperuntukkan bahawa jaminan tidak boleh diberikan kepada seseorang yang dituduh jika kesalahan itu boleh dihukum dengan hukuman mati. Pihak Responden reserve untuk berhujah lanjut semasa peringkat hujahan kelak berkenaan pemakaian Seksyen 388 Kanun Tatacara Jenayah di mana bagi kesalahan di bawah Seksyen 39B ADB 1952 mempunyai peruntukan khas berkenaan jaminan yang mengatasi peruntukan di bawah Kanun Tatacara Jenayah di mana prinsip 'generalia speciliabus non derogent' terpakai.

I

[32] Mahkamah berpendapat bahawa pihak responden telah tersasar di dalam menghargai asas kepada permohonan pihak pemohon. Ia bukan disebabkan kedudukan s 41B ADB 1952 tersebut semata-mata. Namun ia disebabkan telah berlaku pindaan kepada s 39B(2A) ADB 1952 yang menyebabkan kedudukan s 41B ADB 1952 telah mengganggu dan menjejaskan bidang kuasa mahkamah di bawah perkara 121 Perlembagaan Persekutuan. Perkara 121 Perlembagaan Persekutuan menyatakan seperti berikut:

121 Kuasa kehakiman Persekutuan

(1) Maka hendaklah ada dua Mahkamah Tinggi yang setara bidang kuasa dan tarafnya, iaitu —

(a) satu di Negeri-Negeri Tanah Melayu, yang dikenali sebagai Mahkamah Tinggi di Malaya dan yang mempunyai pejabat pendaftarannya yang utama di mana-mana tempat di Negeri-Negeri Tanah Melayu yang ditentukan oleh Yang di-Pertuan Agong; dan

(b) satu di Negeri Sabah dan Sarawak, yang dikenali sebagai Mahkamah Tinggi di Sabah dan Sarawak dan yang mempunyai pejabat pendaftarannya yang utama di mana-mana tempat di Negeri Sabah dan Sarawak yang ditentukan oleh Yang di-Pertuan Agong;

(c) (*Dimansuhkan*),

dan mana-mana mahkamah bawahan yang diperuntukkan oleh undang- undang persekutuan; dan Mahkamah-mahkamah Tinggi dan mahkamah-mahkamah bawahan itu hendaklah mempunyai apa-apa bidang kuasa dan kuasa yang diberikan oleh atau di bawah undang- undang persekutuan.

(1a) Mahkamah-mahkamah yang disebut dalam Fasal (1) tidaklah mempunyai bidang kuasa berkenaan dengan apa-apa perkara dalam bidang kuasa mahkamah Syariah.

(1b) Maka hendaklah ada suatu mahkamah yang dikenali sebagai Mahkamah Rayuan dan yang mempunyai pejabat pendaftarannya yang utama di mana-mana tempat yang ditentukan oleh Yang di-Pertuan Agong, dan Mahkamah Rayuan hendaklah mempunyai bidang kuasa yang berikut, iaitu —

(a) bidang kuasa untuk memutuskan rayuan terhadap keputusan Mahkamah Tinggi atau seseorang hakimnya (kecuali keputusan Mahkamah Tinggi yang diberikan oleh pendaftar atau pegawai lain Mahkamah itu dan yang boleh dirayukan kepada seorang hakim Mahkamah itu di bawah undang-undang persekutuan); dan

(b) apa-apa bidang kuasa lain yang diberikan oleh atau di bawah undang-undang persekutuan.

(2) Maka hendaklah ada suatu mahkamah yang dikenali sebagai Mahkamah Persekutuan dan yang mempunyai pejabat pendaftarannya yang utama di mana-mana tempat yang ditentukan oleh Yang di-Pertuan Agong, dan

Mahkamah Persekutuan hendaklah mempunyai bidang kuasa yang berikut, iaitu —

(a) bidang kuasa untuk memutuskan rayuan terhadap keputusan Mahkamah Rayuan, Mahkamah Tinggi atau seseorang hakimnya;

(b) apa-apa bidang kuasa asal atau runding yang dinyatakan dalam Perkara 128 dan 130; dan

(c) apa-apa bidang kuasa lain yang diberikan oleh atau di bawah undang-undang persekutuan.

(3) Tertakluk kepada apa-apa batasan yang dikenakan oleh atau di bawah undang-undang persekutuan, apa-apa perintah, dekri, penghakiman atau proses mahkamah-mahkamah yang disebut dalam Fasal (1) atau mana-mana hakimnya hendaklah (setakat yang dibenarkan oleh keadaannya) berkuat kuasa dan berkesan sepenuhnya mengikut maksudnya di seluruh Persekutuan, dan boleh dilaksanakan atau dikuatkuasakan di mana-mana bahagian Persekutuan dengan sewajarnya; dan undang-undang persekutuan boleh membuat peruntukan supaya mahkamah-mahkamah di satu bahagian Persekutuan atau pegawai-pegawainya bertindak membantu mahkamah-mahkamah di suatu bahagian lain.

(4) Pada menentukan tempat pejabat pendaftaran utama bagi Mahkamah Tinggi di Sabah dan Sarawak, Yang di-Pertuan Agong hendaklah bertindak atas nasihat Perdana Menteri yang hendaklah berunding dengan Ketua-Ketua Menteri bagi Negeri Sabah dan Sarawak dan Hakim Besar Mahkamah Tinggi itu.

[33] Peguam pihak pemohon menegaskan bahawa s 41B ADB 1952 tersebut telah mengambil bidang kuasa di dalam memutuskan perkara berkaitan dengan jaminan yang telah diputuskan sebagai bidang kuasa kehakiman. Oleh itu s 41B ADB 1952 dihujahkan oleh peguam pihak pemohon adalah bercanggah dengan perkara 121 Perlembagaan Persekutuan.

[34] Bagi menyokong hujahan peguam pemohon, beliau telah merujuk kepada kes *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526. Apa yang penting dalam kes tersebut Mahkamah Persekutuan berpendapat bahawa bidang kuasa kehakiman adalah terletak hanya kepada mahkamah. Ini dinyatakan di perenggan 67 seperti berikut:

> [67] The legal consequence is that art 121(1) of the Federal Constitution states that judicial power or the power to adjudicate in civil and criminal matters brought to the court is vested only in the court. The same position was adopted in an earlier decision of the Federal Court in the dissenting view of Richard Malanjum (CJSS) in *Kok Wah Kuan* (FC) and curiously, as did the majority of the Court of Appeal in the same case: *Kok Wah Kuan v Public Prosecutor* (CA).

[35] Seterusnya Mahkamah Persekutuan menyatakan bahawa bidang kuasa kehakiman yang diberikan di bawah perkara 121(1) Perlembagaan Persekutuan itu adalah seperti berikut:

> [84] Thus, given the strong observations made on the true nature and purpose of the impugned enactment, any alterations made in the judicial functions would tantamount to a grave and deliberate incursion in the judicial sphere.
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> [85] In fact, the subsequent passage in *Liyanage* is illuminating. There, the court observed that:
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> > ... If such Acts as these were valid the judicial power could be wholly absorbed by the legislation and taken out of the hands of the judges. It is appreciated that the legislature has no such general intention. It was be set by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution.
>
> [86] Thus to put it in perspective, the judicial power of the court resides in the Judiciary and no other as is explicit in art 121(1) of the Constitution.
>
> [87] The principles laid down in *Keshavananda Bharati v State of Kerala* AIR 1973 SC 146 were reviewed and affirmed by the Supreme Court in *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 2299. The Supreme Court emphasised the sanctity of the doctrine of separation of powers and the exclusivity of judicial power. Khanne J, in concurring with the majority inter alia held at pp 2340–2347 that:
>
> > ... A declaration that an order made by a court of law is void is normally part of the judicial function and is not a legislative function. Although there is in the Constitution of India no rigid separation of powers, by and large the spheres of judicial function and legislation function have been demarcated and it *is not permissible for the legislature to encroach upon the judicial sphere*. It has accordingly been held that a legislature while it is entitled to change with retrospective effect the law which formed the basis of the judicial decision, it is not permissible to the legislature to declare the judgment of the court to be void or not binding. (Emphasis added.)
>
> [88] The Judiciary is thus entrusted with keeping every organ and institution of the State within its legal boundary. Concomitantly the concept of the independence of the Judiciary is the foundation of the principles of the separation of powers.
>
> [89] This is essentially the basis upon which rests the edifice of judicial power.
>
> [90] The important concepts of judicial power, judicial independence and the separation of powers are as critical as they are sacrosanct in our constitutional framework.
>
> [91] The concepts above have been juxtaposed time and again in our judicial determination of issues in judicial reviews. Thus, an effective check and balance mechanism is in place to ensure that the Executive and the Legislature act within their constitutional limits and that they uphold the rule of law. The Malaysian apex

court had prescribed that the powers of the Executive and the Legislature are limited by the Constitution and that the Judiciary acts as a bulwark of the Constitution in ensuring that the powers of the Executive and the Legislature are to be kept within their intended limit (see *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135; [1978] 1 LNS 143).

[36] Namun demikian, kes *Semenyih Jaya Sdn Bhd* perlu difahami diputuskan dalam penentuan s 40D Akta Pengambilan Tanah 1960. Seksyen 40D Akta Pengambilan Tanah 1960 tersebut telah memberikan kuasa kepada individu yang lain untuk memutuskan pertikaian berkenaan dengan pengambil tanah tersebut. Ini dapat dilihat di perenggan 100 kes tersebut seperti berikut:

[100] In view of s 40D of the Act, a conundrum presents itself in that the discharge of the judicial power and function to determine adequate compensation is now assigned to assessors and not the judge. It is pertinent to note that the act of determining the amount of compensation payable arising out of land acquisition cases involves judicial assessments, for example, whether a particular head of claim is allowed, evidential issues, whether a response to a valuer's report is permitted etc. Hence the power to award compensation in land reference proceedings is a judicial power that should rightly be exercised by a judge and no other.

[37] Begitu juga telah dinyatakan dalam kes tersebut bahawa bidang kuasa kehakiman hanya boleh dijalankan oleh hakim-hakim yang bersidang di mahkamah dan proses kehakiman juga ditadbirkan oleh mereka dan bukan orang lain. Ini dinyatakan seperti berikut:

[114] Our Federal Constitution affirms the polemic that judicial power is exercisable only by judges sitting in a court of law; and that the judicial process is administered by them and no other.

[38] Selain daripada itu peguam pihak pemohon telah merujuk kepada beberapa keputusan mahkamah yang menyatakan bahawa mahkamah mempunyai bidang kuasa untuk memberikan jaminan bagi undang-undang bertulis yang tidak membenarkan jaminan diberikan dengan menggunakan kes *Semenyih Jaya* tersebut. Misalnya dalam kes *Jimmy Seah Thian Heng & Ors v Public Prosecutor* [2019] 7 MLJ 308; [2018] 9 CLJ 769. Kes tersebut melibatkan permohonan jaminan di bawah s 13 Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 ('AKKLLK'). Begitu juga dalam kes *Tamil Selven a/l Letchumenan v Pendakwa Raya* [2019] MLJU 1123; [2019] 1 LNS 1542, keputusan Hakim Mahkamah Rayuan seperti berikut:

[11] Does this mean that bail can only be granted if there is such application by the public prosecutor? We do not think so, and in this regard we agree with the decision of Collin Sequerah J in *Jimmy Seah Thian Heng & Ors v Public Prosecutor* [2018] MLJU 1187; [2018] 9 CLJ 769 that notwithstanding the absence of such application by the public prosecutor, the courts are still vested with the discretion to

grant or not to grant bail to any of the classes of persons enumerated in s 13(2) of the SOSMA.

[39] Begitu juga dalam kes *Raman a/l Shunmugham lwn Pendakwa Raya* [2020] 2 MLJ 675; [2020] 2 CLJ 818 yang menyatakan seperti berikut:

> [22] Melalui pembacaan kami, peruntukan di bawah s 13 SOSMA cukup jelas melalui sub-s (2) bahawa peruntukan itu bukanlah satu halangan secara total terhadap jaminan. Sebaliknya, kami berpandangan peruntukan s 13 SOSMA tidak ubahnya sama seperti peruntukan bawah s 388 KTJ. Apa yang membezakan hanyalah kekecualian terhadap pemakaian peruntukan itu diberikan kepada tiga kategori orang yang sama bawah proviso bagi s 388(1) KTJ. Manakala bagi SOSMA, kekecualian itu terdapat bawah sub-s (2), s 13 SOSMA. Oleh itu, pandangan kami jaminan masih boleh diberikan kepada tertuduh yang dipertuduhkan dengan kesalahan keselamatan sekiranya syarat-syarat yang diperuntukkan bawah sub-s. (2) dipenuhi. Oleh itu juga, s 13 SOSMA bukanlah peruntukan yang sememangnya tidak boleh diberi jamin (*unbailable*). Dengan kata lain, kesalahan-kesalahan keselamatan (*security offences*) adalah kesalahan yang terjumlah kepada kesalahan 'non-bailable' di mana mahkamah masih mempunyai budi bicara untuk membenarkan tertuduh dilepaskan atas jaminan sekiranya syarat-syarat di bawah sub-s (2) dipenuhi.

[40] Mahkamah juga perlu meneliti keputusan di dalam kes *Chinnakarappan v Public Prosecutor* [1962] 1 MLJ 234 dan *Public Prosecutor v Latchemy* [1967] 2 MLJ 79. Dalam kes *Chinnakarappan* telah dinyatakan oleh Hakim Adams bahawa pemberian jaminan atau tidak oleh mahkamah adalah suatu bidang kuasa kehakiman. Namun jika diteliti dalam kes tersebut dapat dilihat bahawa Hakim Adams menyatakan dalam konteks sekiranya kes tersebut adalah kesalahan boleh jamin yang mana ketika mempertimbangkan jaminan tersebut ia adalah merupakan bidang kuasa kehakiman. Ini dinyatakan seperti berikut:

> In my view, therefore, following Spencer Wilkinson J, I do not consider that there is any power for the magistrate to grant bail in cases punishable with death or imprisonment for life. Therefore, the learned magistrate was unable and had no power to grant bail in this present case. But even if I am wrong and the effect of s 2 of the Criminal Justice Ordinance 1953, is to permit in proper cases persons to be released on bail in all non-bailable cases other than those punishable with death, then I would hold that the learned magistrate has considered the matter judicially, exercised his discretion judicially and has come to a decision which I consider is a proper one. It has long been established that once the magistrate has properly exercised his discretion it is not for an appellate court to interfere with it.

[41] Sementara itu dalam kes *Public Prosecutor v Latchemy* isu yang timbul di hadapan mahkamah ialah berkenaan permohonan jaminan bagi kesalahan bunuh oleh seorang wanita di bawah s 388(v) KTJ. Ini dapat dilihat seperti berikut:

As both these appeals are on the same subject matter, it is convenient to deal with them together. The general rule under s 388(v) of the Criminal Procedure Code is that the court should not grant bail to a person charged with an offence punishable with death. One of the exceptions to this rule is that the court may grant bail to a woman accused. In my view this exception is a discretion which should be exercised sparingly and judiciously depending on the reasons of each particular case. Spenser Wilkinson J in the case of *R Ooi Ah Kow* [1952] MLJ 95 at p 97 states as follows:

> Again, following the case of *Re KS Menon*, I was of the opinion that in cases punishable with death and in cases punishable with penal servitude for life the High Court ought not to grant bail, except for exceptional and very special reasons.

The criterion by which a magistrate should allow bail in cases of this type, in my view, is only in those cases where he is convinced that the reasons put forward by the applicant are said to be exceptional and very special reasons.

In the present case the only grounds on which this application for bail was granted by the magistrate's court appear to be as follows:

> The accused is a mother of ten children and youngest of them is still under breast feed.

In my opinion the reasons put forward in this application fall far short of being exceptional and very special reasons and, therefore, the application should have been refused by the magistrate's court.

[42] Peguam pihak pemohon telah merujuk kepada kes *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311, keputusan Mahkamah Tinggi Kuala Lumpur yang telah menghuraikan istilah kuasa kehakiman. Dalam kes tersebut Hakim Zakaria Yatim menyatakan seperti berikut:

> Under our Constitution the words 'judicial power of the Federation' have been defined to mean 'that the court has power to adjudicate in civil and criminal matters which are brought before the court. In criminal trials the High Court is empowered to pass sentence according to law
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> ... See judgment of Ajaib Singh J in *Public Prosecutor v Yee Kim Seng* [1983] 1 MLJ 252. Similarly, Tun Mohamed Suffian, in his book, *An Introduction to the Constitution of Malaysia*, 2nd Ed at p 97, states, '(c) its judicial power (i the power to hear and determine disputes and to try offences and punish offenders) which is vested by Article 121(1)
>
> ...
>
> In my opinion both the definitions given above are too restrictive. In *Minister of Home Affairs v Fisher* [1980] AC 319 at p 329, the Privy Council held that the Constitution should be interpreted with less rigidity and greater generosity than other acts of Parliament. The Constitution must not be construed in any narrow and pedantic sense. See decision of the Privy Council in *James v Commonwealth of Australia* [1936] AC 578 at p 614. The principles of constitutional interpretation as enunciated by the Privy Council in the two cases just cited have been applied in *Merdeka University Bhd v Government of Malaysia* [1981] 2 MLJ 356. Bearing in

mind the principles of constitutional interpretation as laid down in those cases, it is proposed to state the meaning of the words 'judicial power of the Federation' as contained in art 121(1) of the Constitution.

In my opinion, the term 'judicial power' used in art 121(1) means, to borrow the words of Griffith CJ in the *Huddart*'s case, '... the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin ...' until the court, which has the power to give a binding and authoritative decision is called upon to take action. In the context of criminal law, the court possesses the judicial power to try a person for an offence committed by him and to pass sentence against him if he is found guilty. Judicial power includes:

(1) the power to accept a plea of guilty after the charge has been explained to the accused and he understood it, *Heng Kim Khoon v Public Prosecutor* [1972] 1 MLJ 30; *Munandu v Public Prosecutor* [1984] 2 MLJ 82; *Wong Sin Yeow v Public Prosecutor* [1968] 1 MLJ 230; *and Public Prosecutor v Jamalul Khair* [1986] 2 MLJ 371;

(2) the power to allow or refuse a plea to be retracted and that power must be exercised judicially, *Yeoh Eng Hock v Public Prosecutor* [1968] 1 MLJ 85;

(3) the power to grant or refuse bail to an accused person, *Chinnakarappan v Public Prosecutor* [1962] MLJ 234 *and Public Prosecutor v Latchemy* [1967] 2 MLJ 79

(4) the power to grant or refuse a postponement, *Tan Foo Su v Public Prosecutor* [1967] 2 MLJ 19; and

(5) the power to transfer any proceedings to any other court or to or from any subordinate court. See item 12, Schedule to Courts of Judicature Act 1964.

[43] Penelitian kepada kes *Huddart Parker & Co Pty Ltd & Appleton v Moorehead* [1908–1909] 8 CLR 330 adalah menarik untuk melihat bagaimanakah bidang kuasa kehakiman tersebut bermula dalam 'common law' dan bagaimanakah bidang kuasa kehakiman diputuskan dalam konteks undang-undang Australia. Jika diteliti dalam kes tersebut ia adalah berkaitan dengan isu sama ada Ketua Pengarah Kastam mempunyai kuasa untuk mengarahkan pendedahan wajib. Adakah ia tergolong di dalam kuasa kehakiman (*judicial power*), mahkamah menyatakan seperti berikut:

s 71 of the Constitution provides that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court, and in such other Federal Courts as the Parliament creates, and in such other Courts as it invests with Federal jurisdiction. It follows that the Parliament has no power to entrust the exercise of judicial power to any other hands. The Comptroller-General of Customs is not such a court. The question for determination, then, is whether this compulsory discovery appertains to the judicial power. It was argued that the proceeding objected to is in principle analogous to the examination of witnesses

A before a Justice, with a view to the commitment of an accused person for trial on indictment; that in the event of the accused being tried before a Justice of the High Court without a jury, the analogy would be complete, while, if he were tried on indictment and a further investigation before Justices were necessary (which may be doubtful), the result would only be to divide the preliminary inquiry into two stages
B not differing in essential quality; that such proceedings before Justices are always regarded as judicial proceedings, that they must, therefore, be regarded as an exercise of the judicial power; and further, that the interrogation of witnesses with a view to the administration of either the criminal or civil law is a matter that is in practice in Britsh countries entrusted to judicial tribunals, and must, therefore, be regarded as within the term 'judicial power' as used in s 71 of the Constitution.
C

[44] Jika ditinjau sejarah kuasa untuk menjalankan tugas kehakiman di bawah undang-undang *common law* oleh Jaksa Pendamai dapat dilihat dalam kes *Cox v Coleridge* (1822) 1 B & C 37 seperti berikut:

D That is a much stronger case than this, for there the magistrate acts judicially; but here, he is only making a preliminary enquiry, for the purpose of ascertaining whether there is sufficient ground to com-[42]-mit a party for trial. And the case of Bex v. Borron (3 B. & A. 432), is to the same effect. The first statute relative to this subject, is 1 Ric. 3, c. 3, by which power was given to one justice to bail persons
E arrested for suspicion of felony. Then came 3 H. 7, c. 3, which confined that power to two justices, one of whom was to be of the quorum. These were followed by the 1 and 2 Ph. & M. c. 13, which required both justices to be present together at the time of bailing the prisoner; and in the 4th section, directed the magistrates, previously to their taking bail, to take the examination of the prisoner, and the information of them that bring him. And this was afterwards extended by 2 and 3
F Ph. & M. c. 10, to the cases of commitments. Now in all these statutes the Legislature seems to have contemplated one agent only in this preliminary examination, viz. the magistrate, and do not appear to have considered it as at all analogous to a trial in which both sides were to be heard. The proceeding is, in these cases, ex parte only, and the presence of an attorney for the prisoner cannot,
G therefore, be necessary. In Dalton's Justice, c. 164, p. 407, the law on this subject is laid down very strongly, and shews how little discretion a magistrate has in enquiries of this nature. He says, that ' where any felony is committed, and one brought before a justice of peace on suspicion thereof, the justice ought to commit or require bail, though it shall appear to him that the prisoner is not guilty thereof; for it is not fit that a man once arrested and charged with felony, or suspicion thereof, should be
H delivered, on any man's discretion, without farther trial.' For this he quotes Crompton, 34, and Lambard, 229. And in page 408, after enumerating persons who are [43] not to be considered as credible witnesses, he adds, ' But if one be brought before a justice of peace upon suspicion of felony, although the information against the prisoner shall be by such witnesses, yet it seemeth safest for the justice of
I the peace to take their information for the King, and to bind them over to give evidence, &c. and to commit the party suspected, and upon the trial to inform the Justices of Gaol Delivery concerning their credit.' [Bayley J. Those citations, I apprehend, are not law at the present time.] They are, however, authorities shewing what the law was formerly, and how little discretion was considered as vested in magistrates; and Lord Hale, Pleas of the Crown, vol. ii. p. 121, is nearly to the same

effect. He says, ' If a prisoner be brought before a justice, expressly charged with felony by the oath of a party, the justice cannot discharge him, but must bail or commit him ;' and Hawkins, lib. 2, c. 15, s. 1, adopts the opinion of Lord Hale. Nor can the presence of an attorney be requisite, in order to examine witnesses for the prisoner; for it does not appear that the prisoner has any right to examine witnesses in this stage of the case. If the magistrate proceeds under the Statute of Ph. & M., he must examine the witnesses on oath. Now at the time when that statute was passed, the witnesses for the prisoner could not have been so examined. It is true, that Lord Coke, 3 Inst. 79, is of a different opinion, but the universal practice, previously to the 1 Anne, stat. 2, c. 9, s. 3, shews the contrary ; and so was the opinion of Hawkins, lib. 2, c. 46, s. 29. If so, it would seem to follow, that it was not competent for the magistrate to examine witnesses at all for the prisoner, and, consequently, that the presence of an attorney cannot for that purpose be necessary. And this view of the case [44] is confirmed by the mode of proceeding before a coroner, who is bound, according to Lord Hale, Hist. P. C. vol. ii. p. 62, to examine witnesses on oath on both sides, and to certify the whole evidence to the Justices of Gaol Delivery. In that case counsel are allowed to be present. But these proceedings are quite distinguishable from the preliminary examinations before magistrates, and are in fact distinguished on this very ground by Lord Hale

[45] Mahkamah juga meneliti keputusan Hakim Griffith CJ dalam kes *Huddart Parker & Co Pty Ltd & Appleton v Moorehead* berkenaan dengan kes ini dengan menyatakan seperti berikut:

I think that it may also be conceded that of recent years Justices exercising this function have been sometimes regarded and spoken of as exercising judicial functions. It becomes important, therefore, to inquire what is the true nature of their functions. On this point the case of *Cox v Coleridge*, I B & C 37, is very instructive. *At common law the original function of Justices of the Peace was executive, and in no sense judicial, all the judicial functions which they have lately exercised having been conferred by Statute.* The origin and history of their power to examine witnesses with a view to commitment for trial was pointed out in that case by Best J At first a person accused of crime was arrested and kept in confinement until he could be brought to trial. Then the Act I. Rich. III., c. 3, authorised Justices to grant bail to persons accused of felony. This power was abused, and the Act I. Ph. and M., c. 13, directed that before the Justices admitted accused, ie, arrested persons, to bail, they should 'take the examination of the prisoner and the information of them that brought him' before them, and certify the examination to the Justices of gaol delivery. The object was, as pointed out by the learned Judge, not to institute a judicial inquiry, but to obtain information to be given to the Justices of gaol delivery.

[46] Apa yang jelas daripada kedua-dua autoriti tersebut menjelaskan bagaimana bidang kuasa tersebut dilaksanakan dan diterima pakai di Australia seperti yang dikatakan oleh Hakim Zakaria Yatim dalam kes *Public Prosecutor v Dato' Yap Peng* sebagai pedoman dalam kes tersebut semasa beliau menjelaskan maksud kuasa kehakiman di bawah perkara 121(1) Perlembagaan Persekutuan.

[47] Mahkamah Persekutuan melalui keputusan majoriti melalui penghakiman Mohd Azmi Hakim Mahkamah Persekutuan ketika membincangkan s 418A KTJ telah menyatakan bahawa ianya adalah suatu yang bercanggah dengan perkara 121 Perlembagaan Persekutuan disebabkan ia memberikan kuasa kehakiman kepada badan yang bukannya badan kehakiman. Ini dapat dilihat seperti berikut:

> Section 418A clearly confers judicial power on a body which is not a court and as such it is an interference of judicial power of the Federation as enshrined in Article 121 of the Consitution.

[48] Peguam pemohon yang bijaksana juga telah merujuk mahkamah ini kepada kes *Semenyih Jaya* dan berhujah bahawa perkara 121 Perlembagaan Persekutuan memberikan kuasa kehakiman hanya kepada badan kehakiman. Oleh itu peruntukan di bawah s 41B ADB 1952 mengikut hujahan pihak pemohon adalah satu tindakan menghakis kuasa dan bidang kuasa yang hanya boleh dilakukan oleh mahkamah.

[49] Mahkamah berpendapat di dalam kes ini isu yang perlu terlebih dahulu diselesaikan oleh mahkamah ialah sama ada mahkamah bersetuju dengan hujahan peguam pemohon bahawa peruntukan s 41B ADB 1952 tersebut adalah sesuatu yang tidak berperlembagaan. Jika mahkamah bersetuju maka mahkamah boleh mempertimbangkan alasan-alasan yang diberikan dalam afidavit sokongan pemohon sama ada ianya mewajarkan mahkamah menggunakan budi bicara kehakiman untuk membenarkan jaminan yang dipohon.

[50] Kuasa kehakiman adalah merujuk kepada kuasa mahkamah untuk memutuskan suatu pertikaian. Ini telah dijelaskan dengan menarik oleh Mahkamah Persekutuan dalam kes *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals* [2021] 2 MLJ 822; [2021] 4 CLJ 1 seperti berikut:

> [121] The court's function as a court of law is to decide cases that came before it in accordance with Federal law which is enforced at the material time. In this respect, art 121(1) of the FC is clear, in that it provides that courts are established by law (including the FC) and court's jurisdiction and the source of powers are derived from Federal law. 'Federal law' is defined by art 160(2) to mean any Act of Parliament. Courts vis a vis judges do not derive their power in a vacuum and neither can they create jurisdiction for themselves. This is for Parliament to decide via the passing of Federal law when art 121(1) states that '... and the High Courts and inferior courts shall have jurisdiction and powers as may be conferred by or under Federal law'. We had established that Parliament has the Legislative power to enact Federal law in relation to preventive detention under art 149. Section 15B of the POCA is Federal law, and that is where the courts derived its power in judicial review under POCA. This is premised on art 121(1). The courts' duty is to interpret what is provided in s 15B. The powers of the courts cannot be derived from some

amorphous concepts or doctrines, more so when such doctrines or concepts took root from a foreign country. Hence, it is incorrect to state that s 15B is an attempt by Parliament to suppress constitutional powers given to the courts as provided under art 121(1).

[122] The exercise of judicial power does not begin until and unless the court is called upon to do so. Therefore the substratum of laws must first exist before judicial authority comes into being. Such power exists because Parliament enact it to be so. Otherwise, the question of removing judicial authority does not arise.

[51] Mahkamah juga mengambil perhatian kepada keputusan Mahkamah Persekutuan yang telah menelurusi kes-kes berkaitan dengan kuasa kehakiman di bawah perkara 121 iaitu *Maria Chin Abdullah v Public Prosecutor* [2021] 1 MLJ 750 dan *Rovin Joty a/l Kodeeswaran* serta *Semenyih Jaya Sdn Bhd* dan telah membuat satu kesimpulan di dalam kes *Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors* [2022] 3 MLJ 356 seperti berikut:

[202] Given the breadth and scope of art 4(1) of the FC, it is untenable to describe the entirety of judicial power and the jurisdiction of the courts as being confined to the last two lines of art 121(1) of the FC, namely that '… the High Courts … shall have such jurisdiction and powers as may be conferred by or under federal law'.

[203] While it may well have been the intent of Parliament vide A704/1988 to seek to restrict or curtail judicial powers, that intent was not achieved. On an objective construction of the FC holistically it is evident that it is untenable if not impossible to read art 121(1) of the FC in vacuo when deciding on the source, scope and ambit of judicial power. The only tenable construction that can be accorded to judicial power is that it subsists in more than just art 121(1) of the FC, the foremost of which is art 4(1) of the FC.

[204] The said article appearing at the commencement of the FC, sets out the basis for the structure and function of the nation state and the division of power. As such the source of judicial power as contained in the constitutional right of review is vested there. Judicial power is also vested in art 5(2) of the FC. Article 121(1) of the FC sets out where and how such judicial power is structured, namely through the High Courts and the inferior courts. It also sets out the fact that jurisdiction of the courts and its powers are enumerated and set out in federal law.

[205] But these constitutional provisions do not and cannot abrogate judicial power in terms of the inherent jurisdic tion of the court or the constitutional power of judicial review which is contained in art 4(1) of the FC. This is borne out by a simple example. If indeed judicial power is confined to, and limited by, federal law as a literal reading of art 121(1) of the FC may suggest, then how is that there subsists at the same time, power in the Judiciary or the courts to strike down that very same federal law if it is inconsistent with the provisions of the FC? It is contrary to any form of coherent legal rationale that it can be said on the one hand that judicial power is circumscribed by federal law, but on the other, hand, that self-same judicial power can strike down that very same federal law within the same Constitution.

[206] As a constitution is to be read harmoniously, it follows that the only tenable reading to be accorded to an understanding of the source and scope of judicial

power is that judicial power takes its source and ambit from art 4(1) of the FC read in conjunction with art 121(1) of the FC.

[52] Penelitian kepada ke *Dhinesh a/l Tanaphll* dapat difahami bahawa kuasa kehakiman yang dinyatakan di bawah perkara 121 Perlembagaan Persekutuan adalah merupakan punca kuasa kehakiman. Pindaan kepada perkara 121 melalui Pindaan Perlembagaan A704/1988 yang dikatakan cuba menghadkan atau menghakis kuasa kehakiman tidak menghilangkan kuasa kehakiman di dalam melakukan semakan kehakiman dan menjalankan kuasa-kuasa sedia ada (*inherent jurisdiction*). Di samping itu ia juga tidak menghakis kuasa mahkamah untuk mendengar atau memutuskan kes-kes yang berkaitan dengan cabaran keesahan undang-undang yang bercanggah dengan Perlembagaan Persekutuan.

[53] Di dalam kes *Dhinesh a/l Tanaphll* Mahkamah Persekutuan juga telah menjelaskan bahawa keputusan di dalam kes *Rovin Joty a/l Kodeeswaran* tersebut telah diketepikan setelah semakan dibuat di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan. Ini dapat dilihat seperti berikut:

> [47] *Rovin Joty* has however recently been quashed upon review under r 137 of the Rules of the Federal Court, on the grounds of a breach of natural justice, in that the majority judgment there addressed issues that were not in dispute between the parties, resulting in parties being precluded from addressing the court on these fundamental findings. To that extent the decision there is no longer binding on any court. Therefore, the conclusion that the ouster clause in s 15B of the POCA is constitutionally valid, is no longer good law.

[54] Walau bagaimanapun mahkamah harus mengambil maklum bahawa keputusan dalam kes *Dhinesh a/l Tanaphll* dan *Rovin Jotty a/l Kodeeswaran* adalah berkaitan dengan Akta Pencegahan Jenayah 1959 iaitu satu undang-undang yang diluluskan di bawah perkara 149 Perlembagaan Persekutuan. Oleh itu mahkamah ini perlu meneliti kes *Maria Chin Abdullah* yang melibatkan klausa penyingkiran (*ouster clause*) s 59A Akta Imigresen 1959/63. Keputusan majoriti dalam kes tersebut semasa menjelaskan hubungan klausa penyingkiran dengan perkara 121 Perlembagaan Persekutuan menyatakan seperti berikut:

> [513] There is no dispute that s 59A of the Immigration Act was enacted pursuant to art 121(1) of the Federal Constitution. It is this article and not any other article that vests judicial power of the Federation in the courts. Section 59A of the Immigration Act was not, it will be noted, enacted pursuant to any other article of the Federal Constitution which it could be inconsistent with and therefore void under art 4(1).
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> [514] It is important to bear this in mind because the appellant seems to be making the argument that s 59A of the Immigration Act is void not because it is inconsistent with art 121(1) but because it is inconsistent with some other articles of the Federal

Constitution, namely art 5(1) — right to life and personal liberty, art 8(1) — equality before the law and art 10(1) — right to free speech and expression. This is clear from the reliefs that the appellant prayed for in the High Court, amongst which was for a declaration that the decision by the Director General of Immigration to ban her from travelling overseas was unconstitutional and therefore void for breaching these three articles of the Federal Constitution.

[515] With due respect, these articles have no relevance whatsoever to the issue before the court, which is whether Parliament is vested with power by art 121(1) of the Federal Constitution to enact s 59A of the Immigration Act. The answer to this question depends on whether Parliament had acted within the constitutional framework of art 121(1) when it enacted the section and not whether the section is void for being inconsistent with arts 5(1), 8(1) or 10(1) of the Federal Constitution.

[516] Even if, for the sake of argument, that the constitutionality of s 59A of the Immigration Act can be linked to art 5(1) of the Federal Constitution (right to life and personal liberty) the appellant has no valid claim in any event to a right to travel overseas: see Loh Wai Kong. Furthermore, this line of argument is a complete deviation from the issue raised in question 3 of the leave question, which is whether s 59A of the Immigration Act is valid and constitutional in the light of Semenyih Jaya and Indira Gandhi. There is no reference at all in leave question 3 to arts 5(1), 8(1) and 10(1) of the Federal Constitution.

[517] The issue that this court is concerned with is the power of Parliament to make law, which has nothing to do with the right to life and personal liberty, the right to equality before the law and the right to freedom of speech and expression. To bring into the equation articles of the Federal Constitution which have nothing to do with the power of Parliament to make law is to divert attention away from the real issue before the court. Clearly, the enactment of s 59A of the Immigration Act by Parliament is sanctioned by art 121(1) of the Federal Constitution, thus making it a valid ouster clause. A valid ouster clause cannot be struck down under art 4(1). As noted by Edgar Joseph Jr FCJ in *R Rama Chandran*, the extent of judicial review may be determined by legislative intervention.

[55] Setelah menelusuri duluan-duluan kehakiman berkenaan dengan bidang kuasa kehakiman di bawah perkara 121 Perlembagaan Persekutuan adalah jelas dan nyata bahawa sesuatu peruntukan undang-undang yang digubal dan jelas telah mengambil kuasa kehakiman undang-undang tersebut akan diputuskan sebagai tidak berperlembagaan seperti yang dinyatakan dalam kes *Semenyih Jaya Sdn Bhd*. Sementara itu jika peruntukan undang-undang tersebut memperuntukkan secara jelas bahawa bidang kuasa kehakiman adalah terhad disebabkan peruntukan undang-undang bertulis yang memperuntukkan klausa penyingkiran ia tidak secara automatik akan menjadikan peruntukan tersebut adalah tidak berperlembagaan disebabkan bercanggah dengan perkara 121 Perlembagaan Persekutuan seperti yang diputuskan dalam kes *Maria Chin Abdullah*. Ini bermakna mahkamah perlu berhati-hati sebelum memutuskan bahawa peruntukan yang bercanggah dengan perkara 121 Perlembagaan Persekutuan itu secara automatik akan menjadikan peruntukan tersebut tidak berperlembagaan. Mahkamah perlu

melihat apakah peruntukan tersebut mencabut kuasa kehakiman yang telah diberikan di bawah perkara 121 Perlembagaan Persekutuan. Jika ini berlaku maka peruntukan tersebut boleh dikatakan tidak berperlembagaan.

[56] Sebagai pelengkap adalah wajar untuk mahkamah merujuk kepada hakikat kuasa kehakiman yang telah dinyatakan oleh Chan Sek Keong bekas Ketua Hakim Singapura di dalam ceramahnya di *34th Sultan Azlan Shah Law Lecture 2020* di mana dinyatakan seperti berikut:

> The judicial power is part of the sovereign power of the state that is vested in the judiciary so that it can perform its constitutional function. The vesting may be express or implied (or inherent). The term 'judicial power' is not defined in the Federal Constitution, but it has been interpreted to mean 'the power which every sovereign authority [ie the state] must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property'. In the context of constitutional disputes, it is the power to determine whether any legislative or executive actions contravene the Federal Constitution or any of its provisions.
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> The power is exercised in court proceedings by way of judicial review. The judicial power is indispensable for this purpose. If it is destroyed or curtailed, the court cannot perform its constitutional function. Hence, judicial review is an integral part of the constitutional system. Without it, there is no rule of law. If the court has no jurisdiction or power to review a law, including an amendment, for unconstitutionality, the rule of law becomes the rule of Parliament. The courts will become 'servile agents' of Parliament and the executive. Constitutional government provided under the Constitution will cease to exist. Absent judicial power, Parliament is no longer subject to the Constitution, and/or the executive is no longer subject to the law. For these reasons, judicial power and judicial review are fundamental to the Constitution.

[57] Sebaliknya di dalam kes ini peruntukan di bawah s 41B ADB 1952 tersebut pada hemat mahkamah tidak menarik kuasa kehakiman atau melanggari peruntukan di bawah perkara 121 Perlembagaan Persekutuan. Ini adalah disebabkan s 41B ADB 1952 tersebut telah digubal bagi memperincikan bagaimana mahkamah perlu menjalankan bidang kuasa kehakiman di dalam memberikan jaminan kepada kesalahan-kesalahan yang diperuntukan di bawah s 41B ADB 1952 yang tidak dibenarkan untuk memberikan jaminan. Jika diteliti kepada Penyata Rasmi Parlimen (*Hansard*) bertarikh 10 Januari 1978 ketika Rang Undang-undang Dadah Berbahaya (Pindaan) No 4 dibentangkan untuk bacaan kali kedua telah diperjelaskan tujuan pindaan s 41B ADB 1952 diperkenalkan. Ia dapat dilihat melalui ucapan Datuk Seri Hj Hamzah bin Datuk Abu Samah di ms 6986 seperti berikut:

> Adalah didapati bahawa melepaskan seorang yang dituduh atas jaminan bagi sesuatu kesalahan di bawah Ordinan ini kerapkali menghampakan tujuan-tujuan pihak pendakwa kerana yang dituduh samada terus menjalankan dengan lebih giat

lagi urusannya mengedarkan dadah berbahaya dengan tujuan untuk mendapatkan lebih banyak wang bagi melegakan kesan sabitan dan hukuman yang akan diterima, atau, jika ia adalah seorang penagih, ia terus menghisap dadah sehingga ia tidak dapat dipulihkan bila perbicaraanya selesai. Oleh yang demikian adalah difikirkan bahawa dalam kes-kes yang boleh dikenakan hukuman mati atau penjara selama lebih daripada lima tahun jaminan sekali-kali tidak diberi kepada seseorang yang dituduh, dan di dalam kes-kes yang lain jaminan tidaklah diberi jika Pendakwa Raya memperakui secara bertulis bahawa bukannya bagi kepentingan awam untuk membenarkannya dijamin. Justeru itu, adalah dicadangkan untuk memasukkan suatu Seksyen 41B baharu di dalam Ordinan itu sebagaimana yang dinyatakan dalam FasaI 6 Rang Undang-undang itu.

[58] Rujukan kepada Penyata Rasmi Parlimen itu penting untuk tujuan menentukan sama ada s 41B ADB 1952 itu adalah berperlembagaan atau sebaliknya seperti ujian yang dicadangkan di dalam kes *Public Prosecutor v Su Liang Yu*. Berdasarkan kepada Penyata Rasmi Parlimen tersebut jelas menunjukkan tujuan dan polisi penggubalan s 41B ADB 1952 tersebut yang perlu dipertimbangkan oleh mahkamah bagi menentukan sama ada peruntukan s 41B ADB 1952 tersebut adalah sah di sisi Perlembagaan.

[59] Apa yang jelas daripada kes-kes tersebut ialah mahkamah akan mempunyai kuasa untuk menjalankan tugas kehakiman mereka sekiranya diperuntukkan oleh undang-undang. Ketika itu mahkamah menjalankan tugas kehakiman dan perlu menjalankannya berdasarkan prinsip undang-undang dan mempertahankan kebebasan kehakiman. Ini bermakna sekiranya undang-undang tidak membenarkan untuk mahkamah menjalankan bidang kuasa kehakiman seperti undang-undang tidak memperuntukkan bidang kuasa mahkamah untuk membicarakan kes, undang-undang tidak membenarkan mahkamah mempertimbangkan apa-apa permohonan jaminan ia tidak boleh secara automatik dikatakan sebagai bercanggah dengan Perlembagaan Persekutuan. Ini adalah disebabkan undang-undang yang diluluskan oleh badan perundangan dalam konteks ini s 41B ADB 1952 adalah di bawah bidang kuasa Parlimen untuk meluluskan undang-undang tersebut.

[60] Ianya perlu dibezakan dengan kes *Semenyih Jaya Sdn Bhd* kerana di dalam kes tersebut s 40D Akta Pengambilan Tanah memberikan kuasa kehakiman kepada pihak lain untuk menjalankan tugas kehakiman yang sudah pasti bercanggah dengan Perlembagaan Persekutuan hatta perkara 121 itu sendiri. Oleh sebab itulah maka dalam kes *Semenyih Jaya Sdn Bhd* Mahkamah Persekutuan berpendapat bahawa peruntukan s 40D Akta Pengambilan Tanah itu sendiri adalah suatu bercanggah dan telah mengambil tugas kehakiman yang telah diperuntukkan secara tersurat di dalam perkara 121 Perlembagaan Persekutuan.

[61] Mahkamah juga berpendapat bahawa s 41B ADB 1952 tersebut tidak bercanggah dengan perkara 121 Perlembagaan Persekutuan. Ini adalah disebabkan walaupun kuasa untuk memberikan jaminan itu adalah satu kuasa kehakiman namun ia diperuntukkan di bawah undang-undang bertulis. Ini bermakna semasa mahkamah menggunakan kuasa kehakiman bagi memberikan satu jaminan bagi suatu kes ia adalah diperuntukkan di bawah undang-undang bertulis seperti di bawah s 388 KTJ dan s 13 Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 atau undang-undang bertulis lain yang memperuntukkan secara jelas kuasa mahkamah untuk memberikan jaminan. Dalam erti kata lain kuasa kehakiman untuk memberikan jaminan bukannya termasuk dalam bidang kuasa sedia ada mahkamah atau bidang kuasa semakan kehakiman mahkamah. Apa yang jelas bidang kuasa kehakiman untuk memberikan jaminan adalah sesuatu yang dizahirkan dalam undang-undang bertulis.

[62] Oleh itu, sekiranya undang-undang bertulis tersebut telah memperuntukkan bahawa tiada jaminan boleh diberikan oleh mahkamah seperti dalam s 41B ADB 1952 ini, ia tidak boleh ditafsirkan sebagai menghakis bidang kuasa kehakiman dan bercanggah dengan perkara 121 Perlembagaan Persekutan. Ini adalah kerana kuasa kehakiman untuk tidak memberikan jaminan telah dinyatakan secara tersurat di dalam undang-undang bertulis.

[63] Setelah meneliti afidavit-afidavit yang difailkan dan berdasarkan kepada duluan kehakiman yang dinukilkan di atas mahkamah berpendapat bahawa s 41B ADB 1952 adalah berperlembagaan dan tidak bercanggah dengan perkara 121 Perlembagaan Persekutuan.

Perbandingan s 41B ADB 1952 dengan s 13 Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 2012

[64] Pada masa yang sama mahkamah juga perlu memahami bahawa keputusan-keputusan mahkamah berkaitan dengan kebenaran untuk memberikan jaminan kepada tertuduh walaupun undang-undang di mana tertuduh tersebut dipertuduhkan tidak membenarkan jaminan harus diteliti peruntukan undang-undang tersebut misalnya di bawah s 13 Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 menyatakan seperti berikut:

13 Bail

(1) Bail shall not be granted to a person who has been charged with a security offence.

(2) Notwithstanding subsection (1) —

(a) a person below the age of eighteen years;

(b) a woman; or

(c) a sick or an infirm person,

charged with a security offence, other than an offence under Chapter VIA of the Penal Code [Act 574] and the Special Measures Against Terrorism in Foreign Countries Act 2015 [Act 770], may be released on bail subject to an application by the Public Prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code.

[65] Jika dibuat perbandingan s 13 SOSMA ini adalah menyerupai peruntukan di bawah s 388 KTJ. Seksyen 388 KTJ menyatakan seperti berikut:

388 When person accused of non-bailable offence may be released on bail —

(1) When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court, he may be released on bail by the officer in charge of the police district or by that Court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of that officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) An officer or a Court releasing any person on bail under subsection (1) or (2) shall record in writing the reasons for so doing.

(4) If at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of the offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

(5) Any Court may at any subsequent stage of any proceeding under this Code cause any person who has been released under this section to be arrested and may commit him to custody.

[66] Apa yang berbeza hanyalah s 13 SOSMA memberikan syarat atau peruntukan tambahan bahawa perlu mendapat permohonan daripada timbalan pendakwa raya dan telah diletakkan peranti kepada tertuduh yang telah diputuskan oleh mahkamah tidak menghalang mahkamah untuk memberikan jaminan. Ini bermakna prinsip-prinsip yang terdapat dalam menimbangkan permohonan jaminan di bawah s 388 KTJ boleh digunakan

untuk pertimbangan di bawah s 13 SOSMA tersebut. Oleh itu pada hemat mahkamah terdapat keputusan mahkamah yang menyatakan bahawa permohonan jaminan boleh diberikan di bawah s 13 SOSMA tersebut. mahkamah mendapati tiada sebarang keputusan mahkamah atasan yang secara jelas menyatakan bahawa s 13 SOSMA itu tidak berperlembagaan.

[67] Apa yang penting ialah mahkamah perlu mengambil perhatian bahawa di dalam undang-undang berkaitan dengan jaminan terdapat tiga kategori kesalahan yang berkaitan jaminan iaitu:

(a) kesalahan boleh jamin (*bailable*);

(b) kesalahan tidak boleh jamin (*non-bailable*); dan

(c) kesalahan yang tidak boleh langsung dijamin (*unbailable*).

[68] Adalah didapati bahawa dalam kes yang melibatkan SOSMA Mahkamah Rayuan dalam kes *Raman Shunmugham* menyatakan dengan jelas bahawa kesalahan SOSMA adalah kesalahan '*non-bailable*' dan tidak langsung menyatakan ia adalah '*unbailable*'.

[69] Apa yang jelas s 41B ADB 1952 ini adalah suatu kesalahan '*unbailable*' seperti yang dinyatakan oleh kes-kes yang terdahulu. Oleh itu tidak timbul isu bahawa s 41B ADB 1952 ini adalah tidak berperlembagaan kerana setakat ini tiada keterangan yang menunjukkan bahawa keesahan anggapan selaras dengan Perlembagaan tidak ditunjukkan.

[70] Walau bagaimanapun mahkamah juga perlu mengambil perhatian bahawa s 41B ADB 1952 sekarang telah berada dalam ADB 1952 yang telah dipinda s 39B(2A). Ini membawa kepada satu yang menarik iaitu pada masa dahlu sebelum pindaan s 39B(2A) diperkenalkan maka s 41B tersebut adalah relevan. Ini disebabkan pada masa itu hukuman di bawah s 39B hanyalah hukuman mati mandatori. Adakah ia menjadikan kesalahan di bawah s 39B tersebut bukan lagi satu kesalahan tidak boleh jamin *unbailable* tetapi ianya adalah kesalahan '*non-bailable*'? Ia membawa maksud s 388 KTJ perlu digunakan dalam mempertimbangkan jaminan yang diberikan kepada pemohon seperti yang telah diputuskan di dalam kes *Puan bt Saad v Public Prosecutor* [2020] MLJU 1880; [2021] 1 CLJ 121.

[71] Jika diteliti kepada pindaan s 39B(2A) tersebut ia jelas menunjukkan bahawa setelah seseorang itu disabitkan dengan kesalahan di bawah s 39B(2A) mahkamah boleh semasa menjatuhkan hukuman mempertimbangkan faktor-faktor yang terdapat di bawah s 39B(2A) tersebut dengan tidak menjatuhkan hukuman mati sebaliknya menggantikan dengan hukuman yang lain. Ia membawa maksud lain pada asalnya pertuduhan adalah di bawah s 39B

yang akan membawa kepada hukuman mandatori mati. Sekiranya semasa perbicaraan terdapatnya keterangan-keterangan yang dapat mengkategorikan kesalahan tersebut berdasarkan keterangan bagi membolehkan mahkamah semasa mempertimbangkan hukuman tidak mengenakan hukuman mati.

[72] Ini bermakna pindaan kepada s 39B(2A) tersebut tidak membawa kesan kepada s 41B ADB 1952. Ini adalah disebabkan pada asalnya seseorang itu dituduh di bawah s 39B ADB 1952 yang mana hukumannya adalah hukuman mati mandatori. Di samping itu wewenang dan kebijaksanaan badan perundangan yang tidak membuat pindaan di bawah s 41B ADB 1952 semasa pindaan s 39B(2A) dibuat pada tahun 2017 memberi satu kefahaman bahawa ia adalah kekal di bawah s 41B ADB 1952 yang membawa maksud kes-kes yang terdahulu yang menyatakan bahawa s 41B ADB 1952 adalah perlu ditafsirkan berbeza dengan s 388 KTJ masih terpakai. Mahkamah juga berpendapat tidak timbul isu s 41B ADB 1952 bercanggah dengan perkara 121 Perlembagaan Persekutuan.

Adakah s 41B ADB 1952 melanggari perkara 8 Perlembagaan Persekutuan?

[73] Perkara 8 Perlembagaan Persekutuan menyatakan seperti berikut:

8 Kesamarataan

(1) Semua orang adalah sama rata di sisi undang-undang dan berhak mendapat perlindungan yang sama rata di sisi undang-undang.

(2) Kecuali sebagaimana yang dibenarkan dengan nyata oleh Perlembagaan ini, tidak boleh ada diskriminasi terhadap warganegara semata-mata atas alasan agama, ras, keturunan, tempat lahir atau jantina dalam mana-mana undang-undang atau dalam pelantikan kepada apa-apa jawatan atau pekerjaan di bawah sesuatu pihak berkuasa awam atau dalam pentadbiran mana-mana undang-undang yang berhubungan dengan pemerolehan, pemegangan atau pelupusan harta atau berhubungan dengan penubuhan atau penjalanan apa-apa perdagangan, perniagaan, profesion, kerjaya atau pekerjaan.

(3) Tidak boleh ada diskriminasi yang memihak kepada mana-mana orang atas alasan bahawa dia seorang rakyat Raja bagi mana-mana Negeri.

(4) Tiada pihak berkuasa awam boleh mendiskriminasikan mana-mana orang atas alasan bahawa dia bermastautin atau menjalankan perniagaan di mana-mana bahagian Persekutuan di luar bidang kuasa pihak berkuasa itu.

(5) Perkara ini tidak menidaksahkan atau melarang —

(a) apa-apa peruntukan yang mengawal selia undang-undang diri;

(b) apa-apa peruntukan atau amalan yang mengehadkan jawatan atau pekerjaan yang berkaitan dengan hal ehwal mana-mana agama, atau sesuatu institusi yang diuruskan oleh sekumpulan orang yang

menganuti mana-mana agama, kepada orang yang menganuti agama itu;

(c) apa-apa peruntukan bagi perlindungan, kesentosaan atau pemajuan orang asli Semenanjung Tanah Melayu (termasuk perizaban tanah) atau perizaban bagi orang asli suatu perkadaran yang munasabah daripada jawatan-jawatan yang sesuai dalam perkhidmatan awam;

(d) apa-apa peruntukan yang menetapkan kemastautinan di sesuatu Negeri atau di sebahagian sesuatu Negeri sebagai suatu kelayakan bagi pemilihan atau pelantikan kepada mana-mana pihak berkuasa yang mempunyai bidang kuasa hanya di Negeri atau di bahagian itu sahaja, atau bagi pengundian dalam pemilihan itu;

(e) apa-apa peruntukan Perlembagaan sesuatu Negeri, yang adalah atau yang bersamaan dengan suatu peruntukan yang berkuat kuasa sebaik sebelum Hari Merdeka;

(f) apa-apa peruntukan yang mengehadkan pengambilan masuk tentera ke dalam Rejimen Askar Melayu kepada orang Melayu.

[74] Mahkamah ini meneliti pemerhatian dan pandangan berkenaan perkara 8 Perlembagaan Persekutuan ini dan keputusan-keputusan mahkamah berkenaan dengannya yang diutarakan oleh Professor Emeritus Dr Shad Saleem Faruqi dalam bukunya *Our Constitution* (Sweet & Maxwell Thomson Reuters) 2019 di ms 123 seperti berikut:

> The judicial attitude to this is that Article 8 does not require that all persons, in all circumstances and everywhere, must be treated alike. All that is requires is that like should be treated alike. A person in one class should be treated on par with another person in the same class. The legislature is permitted to differentiate citizens into various classes. But the classification should not be based on constitutionally forbidden grounds or on arbitrary or irrational differences. The court is the final arbiter on the question whether the classification is intelligible; whether it reasonably distinguishes persons or things grouped together in the class from others left out; and whether the differentiation adopted has a rational relationship to what is to be achieved by the statute in question. The spirit of the Constitution is that all discrimination is illegal unless expressly permitted by the basic law or adjudged by the courts to be reasonable.

[75] Ini adalah sejajar dengan keputusan Mahkamah Persekutuan dalam kes *Public Prosecutor v Khong Teng Khen & Anor* [1976] 2 MLJ 166 melalui penghakiman YAA Suffian Ketua Hakim Negara yang menyatakan seperti berikut:

> The principle underlying art 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstance, nor that it 'must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation', *Kedar Nath v State of West Bengal* AIR

1953 SC 404 406. In my opinion, the law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them or punishing them if found guilty; the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class; the law may classify offences into different categories andprovide that some offences be triable in a magistrate's court, others in a sessions court, and yet others in the High Court; the law may provide that certain offences be triable even in a military court; fiscal law may divide a town into different areas andprovide that ratepayers in one area pay a higher or lower rate than those of another area, and in the case of income tax provide that millionaires pay more tax than others; and yet in my judgment in none of these cases can the law be said to violate art 8. All that art 8 guarantees is that a person in one class should be treated the same as another person in the same class, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer inthe same area, and a millionaire the same income tax as another millionaire, and so on.

Ia turut diperjelaskan dalam kes *Government of Malaysia v VR Menon* [1990] 1 MLJ 277.

[76] Dalam kes *Malaysian Bar & Anor v Government of Malaysia* [1987] 2 MLJ 165 Mahkamah Persekutuan telah menggariskan prinsip-prinsip bagi menentukan keesahan undang-undang di bawah perkara 8 Perlembagaan Persekutuan. Ia dinyatakan oleh YA Hakim Mohamed Azmi seperti berikut:

What is the standard for validity under art 8? Three of the nine principles based on Indian decisions and approved by the Federal Court in *Datuk Haji Harun bin Haji Idris v Public Prosecutor* may be reproduced as follows:

(a) The first question to be asked is, is the law discriminatory, and that the answer should then be — if the law is not discriminatory, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation, we have to ask the further question, is it allowed? If it is, the law is good, and if it is not the law is void.

(b) Discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification, provided that —

(i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and

(ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

(c) In considering art 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy.

[77] Malahan dalam kes *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 Mahkamah Persekutuan melalui penghakiman YAA Suffian Ketua Hakim Negara telah menggariskan prinsip-prinsip yang perlu digunakan bagi menentukan perlanggaran perkara 8 Perlembagaan Persekutuan seperti berikut:

> Doing the best we can, we are of the opinion that the principles relevant to this appeal that may be deduced from the Indian decisions and from consideration of our constitution are these:
>
> 1. The equality provision is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.
>
> 2. The equality provision is qualified. Specifically, discrimination is permitted within cl (5) of art 8 and within art 153.
>
> 3. The prohibition of unequal treatment applies not only to the legislature but also to the executive — this is seen from the use of the words 'public authority' in cl (4) and 'practice' in cl (5)(b) of art 8.
>
> 4. The prohibition applies to both substantive and procedural law.
>
> 5. Article 8 itself envisages that there may be lawful discrimination based on classification — thus Muslims as opposed to non-Muslims (para (b) of cl (5) of art 8); aborigines as opposed to others (para (c)); residents in a particular State as opposed to residents elsewhere (para (d)); and Malays and natives of Borneo as opposed to others who are not (art 153).
>
> 6. In India the first question they ask is, is there classification? If there is and subject to other conditions, they uphold the law. If there is no classification, they strike it down.
>
> With respect we would agree with the Solicitor-General's submission that the first question we should ask is, is the law discriminatory, and that the answer should then be — if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, and if it is not, the law is void.
>
> 7. In India discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification, using the words used in the passage reproduced above from the judgment in *Shri Ram Krishna Dalmia*, provided that:
>
> (i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and

(ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

The Solicitor-General submits that if the Indian doctrine of classification is to be accepted by our courts, which he argues has not been done, it may be accepted subject to the modification that the courts should not take it upon itself to consider whether the classification is reasonable or not, a task which should be left to the legislature. In our opinion the doctrine of classification should be accepted by our courts, subject to what we said in para 6 above. We adhere to what was said in *Public Prosecutor v Khong Teng Khen* at p 170:

> The principle underlying art 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstances, nor that it 'must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation', *Kedar Nath v State of West Bengal* (AIR 1953 SC 404 406).
>
> In my opinion, the law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them or punishing them if found guilty; the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class; the law may classify offences into different categories and provide that some offences be triable in a magistrate's court, others in a sessions court, and yet others in the High Court; the law may provide that certain offences be triable even in a military court; fiscal law may divide a town into different areas and provide that ratepayers in one area pay a higher or lower rate than those of another area, and in the case of income tax provide that millionaires pay more tax than others; and yet in my judgment in none of these cases can the law be said to violate art 8. All that art 8 guarantees is that a person in one class should be treated the same as another person in the same class, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on.

As regards the narrower question whether or not the courts should leave it to the legislature alone to go into the reasonableness of the classification, we think that the court should not, that in other words the court should consider the reasonableness of the classification.

8. Where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional if there is in the law no guideline as to the class of cases in which either procedure is to be resorted to. But it is constitutional if the law contains provisions for appeal, so that a decision under it may be reviewed by a higher authority. The guideline may be found in the law itself; or it may be inferred from the objects and reasons of the bill, the preamble and surrounding circumstances, as well as from the provisions of the law itself. The fact that the executive may choose either procedure does not in itself affect the validity of the law.

A (Minority judgment in *NI Caterers*) and judgment in *M Chhagganlal*). We think that we should follow the same principle.

9. In considering art 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards
B different groups of persons to give effect to its policy (per Sastri CJ in *Anwar Ali*).

10. Mere minor differences between two procedures are not enough to invoke the inhibition of the equality clause (per Bhagwati J in *Chhagganlal*).

C **[78]** Di dalam kes ini penelitian kepada afidavit sokongan dan hujahan yang dikemukakan oleh pihak pemohon adalah didapati tiada sebarang penekanan diberikan kepada s 41B ADB 1952 tersebut adalah bertentangan dengan perkara 8 Perlembagaan Persekutuan. Ia hanya dinyatakan di dalam Lampiran A notis usul tersebut. Apa yang dapat difahami daripada Lampiran A tersebut
D ialah pemohon menyatakan bahawa disebabkan pindaan s 39B(2A) ADB 1952 tersebut menyebabkan pemohon sepatutnya diberikan jaminan seperti yang boleh diberikan oleh mahkamah terhadap kesalahan-kesalahan lain yang juga boleh diberikan jaminan.

E **[79]** Mahkamah berpendapat jika diteliti kepada pindaan s 39B(2A) ADB 1952 tersebut ia jelas menunjukkan bahawa setelah seseorang itu disabitkan dengan kesalahan di bawah s 39B(2A) ADB 1952 mahkamah boleh semasa menjatuhkan hukuman mempertimbangkan faktor-faktor yang terdapat di bawah s 39B(2A) ADB 1952 tersebut dengan tidak menjatuhkan hukuman
F mati sebaliknya menggantikan dengan hukuman yang lain. Ia membawa maksud bahawa pertuduhan di bawah s 39B ADB 1952 boleh dijatuhkan hukuman mati. Sekiranya semasa perbicaraan terdapat keterangan-keterangan yang dapat ditunjukkan bagi mahkamah mempertimbangkan hukuman pemenjaraan dan tidak mengenakan hukuman mati maka mahkamah boleh
G menjatuhkan hukuman pemenjaraan.

[80] Oleh itu mahkamah mendapati tiada alasan untuk menyatakan bahawa peruntukan di bawah s 41B ADB 1952 tersebut adalah bercanggah dengan perkara 8 Perlembagaan Persekutuan. Ini adalah disebabkan hukuman yang
H utama bagi pertuduhan di bawah s 39B ADB 1952 semasa pertuduhan dikemukakan ialah hukuman mati di mana setelah perbicaraan dijalankan mahkamah boleh mempertimbangkan hukuman pemenjaraan yang tidak kurang daripada 15 tahun. Selain daripada itu s 41B ADB 1952 itu juga memperihalkan keadaan yang membolehkah jaminan tidak ditawarkan.
I Mahkamah berpendapat pengkelasan sedemikian tidak melanggari perkara 8 Perlembagaan Persekutuan.

Adakah s 41B ADB 1952 bercanggah dengan melanggari perkara 5 Perlembagaan Persekutuan?

[81] Perkara 5 Perlembagaan Persekutuan memperuntukkan seperti berikut:

5 Kebebasan diri

(1) Tiada seorang pun boleh diambil nyawanya atau dilucutkan kebebasan dirinya kecuali mengikut undang-undang.

(2) Jika pengaduan dibuat kepada Mahkamah Tinggi atau mana- mana hakim Mahkamah Tinggi menyatakan bahawa seseorang sedang ditahan dengan menyalahi undang-undang, maka mahkamah itu hendaklah menyiasat pengaduan itu dan, melainkan jika mahkamah itu berpuas hati bahawa tahanan itu adalah sah, hendaklah memerintahkan supaya orang itu dibawa ke hadapan mahkamah itu dan melepaskannya.

(3) Jika seseorang ditangkap maka dia hendaklah diberitahu dengan seberapa segera yang boleh alasan-alasan dia ditangkap dan dia hendaklah dibenarkan berunding dengan dan dibela oleh seorang pengamal undang-undang pilihannya.

(4) Jika seseorang ditangkap dan tidak dilepaskan, maka orang itu hendaklah tanpa kelengahan yang tidak munasabah, dan walau bagaimanapun dalam tempoh dua puluh empat jam (tidak termasuk masa apa-apa perjalanan yang perlu) dibawa ke hadapan majistret dan orang itu tidak boleh ditahan dalam jagaan selanjutnya tanpa kebenaran majistret itu:

Dengan syarat bahawa Fasal ini tidaklah terpakai bagi penangkapan atau penahanan mana-mana orang di bawah undang-undang yang sedia ada yang berhubungan dengan kediaman terhad, dan kesemua peruntukan Fasal ini hendaklah disifatkan telah menjadi suatu bahagian integral Perkara ini mulai dari Hari Merdeka:

Dengan syarat selanjutnya bahawa dalam pemakaiannya bagi seseorang, selain seorang warganegara, yang ditangkap atau ditahan di bawah undang-undang yang berhubungan dengan imigresen, Fasal ini hendaklah dibaca seolah-olah perkataan 'tanpa kelengahan yang tidak munasabah, dan walau bagaimanapun dalam tempoh dua puluh empat jam (tidak termasuk masa apa-apa perjalanan yang perlu)' telah digantikan dengan perkataan 'dalam tempoh empat belas hari':

Dan dengan syarat selanjutnya bahawa dalam hal penangkapan bagi sesuatu kesalahan yang boleh dibicarakan oleh mahkamah Syariah, sebutan dalam Fasal ini mengenai majistret hendaklah ditafsirkan sebagai termasuk sebutan mengenai hakim mahkamah Syariah.

(5) Fasal (3) dan (4) tidaklah terpakai bagi orang asing musuh.

[82] Mahkamah mendapati bahawa setelah meneliti keputusan-keputusan mahkamah berkenaan dengan perlanggaran perkara 5 Perlembagaan Persekutuan di dalam undang-undang bertulis yang diluluskan oleh Parlimen, Abdul Aziz Bari dan Farid Sufian Shuaib di dalam bukunya *Constitution of Malaysia Text and Commentary* 2nd Ed 2006 di ms 19 menyatakan seperti berikut:

A

> Thus it is quite apparent that thus far the term 'law' in art 5(1) has no real significant impact as far as testing the constitutionality of legislations is concerned. Malaysian courts have apparently preferred literal and pedantic approach on the issue.

B

[83] Jaminan kepada hak kebebasan dalam Perlembagaan Persekutuan adalah satu yang penting yang perlu dipertahankan dan dimuliakan oleh mahkamah. Ia juga sering dinyatakan oleh mahkamah atasan. Mahkamah ini perlu akur dan mengikut prinsip-prinsip tersebut berdasarkan kepada prinsip-prinsip duluan kehakiman. Misalnya di dalam kes *Yahya Hussein Mohsen Abdulrab v Public Prosecutor* [2021] 5 MLJ 811; [2021] 9 CLJ 414 yang menyatakan seperti berikut:

C

> [32] It is beyond argument that art 5(1) of the Federal Constitution fundamentally guarantees the right to a fair trial. This is encompassed in the words 'save in accordance with law'. In other words, it is only through the process of law that a person may be deprived of his life or personal liberty.
>
> D
>
> [33] That art 5(1) guarantees the right to a fair trial is etched into our case law. See for example the two judgments of this court in *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2010] 4 CLJ 265; [2010] 2 MLJ 312, at para [49] and *Public Prosecutor v Gan Boon Aun* [2017] 4 CLJ 41; [2017] 3 MLJ 12, at para [13] .
>
> E
>
> [36] The above passage although relates to hearings before a fair and impartial tribunal is capable of a wide enough construction to refer to the consequence of a breach of the right of fair trial in the context of a criminal case. The principle in the passage cited is that where an accused person is denied his right to a fair trial, the result of that breach warrants an acquittal and discharge.

F

Begitu juga dalam kes *Wong Shee Khai*.

[84] Walau bagaimanapun di dalam kes ini mahkamah mendapati bahawa di dalam afidavit sokongan dan hujahan bertulis tiada dibangkitkan secara khusus berkenaan dengan perlanggaran perkara 5 Perlembagaan Persekutuan dengan penggubalan s 41B ADB 1952 tersebut. Apa yang ada daripada hujahan lisan peguam pemohon yang bijaksana En Muhammad Shafee Md Abdullah ialah sekiranya jaminan diberikan ia akan memberi peluang kepada pemohon untuk berbincang dengan mendalam bersama-sama peguambela beliau bagi membuat persediaan bagi perbicaraan kes ini. Timbalan pendakwa raya En Abdul Ghafar Ab Latif telah menyanggah hujahan tersebut.

G

H

[85] Mahkamah ini berpendapat bahawa peruntukan s 41B ADB 1952 tersebut tidak dapat ditunjukkan oleh pemohon telah melanggar peruntukan perkara 5 Perlembagaan Persekutuan bagi membolehkan mahkamah mengisytiharkan bahawa s 41B ADB 1952 tersebut adalah tidak berperlembagaan.

I

Adakah mahkamah boleh menggunakan bidang kuasa untuk mempertimbangkan jaminan bagi kes ini seperti yang terdapat di bawah s 388 KTJ

[86] Peguam pemohon En Muhammad Shafee Md Abdullah di dalam hujahannya yang meyakinkan menyatakan mahkamah ini mempunyai pilihan untuk mempertimbangkan permohonan jaminan pemohon berdasarkan kepada alasan-alasan yang diberikan oleh pemohon di dalam afidavit beliau. Faktor kesihatan, umur pemohon 79 tahun, rekod cemerlang perkhidmatan pemohon dengan Kerajaan Malaysia dan tiada kemungkinan pemohon akan melarikan diri setelah jaminan diberikan perlu dipertimbangkan oleh mahkamah.

[87] Beliau telah menukilkan kes *Puan Saad*. Dalam kes tersebut Puan Saad telah dipertuduhkan dengan pertuduhan di bawah s 39B(1)(a) ADB 1952 yang boleh dihukum di bawah s 39B(2) Akta yang sama bagi kesalahan memiliki 780.18g heroin bersama-sama dengan seorang lagi. Puan Saad berumur 68 tahun. Dia juga mempunyai sakit jantung dan darah tinggi. Dia juga adalah seorang suri rumahtangga. Jika perbicaraan jenayah tersebut tidak disegerakan ia akan menjejaskan kesihatan Puan Saad. Pesuruhjaya kehakiman dalam kes tersebut telah membenarkan jaminan sebanyak RM10,000 dengan dua orang penjamin serta passport diserahkan kepada mahkamah. Di samping itu dia juga diminta untuk melaporkan kepada balai polis pada bila-bila masa apabila ingin meninggalkan Bandaraya Alor Setar. Pesuruhjaya kehakiman dalam kes tersebut telah memberikan alasan jaminan diberikan seperti berikut:

> [28] The scenario where the applicant has already been in custody and the trial is not likely to conclude for some time, which can be characterised as unreasonable, though not necessary that bail shall be granted. The factors such as, previous conduct and behaviour of the accused in the court, the period of detention of the accused and health, age and sex of the accused also may be considered at the time of grant of bail.
>
> [29] The court is of the view that where the accused/applicant has already been in custody and the trial is not likely to conclude for some time may affect the health of an aged woman like the accused/applicant in this case. The time lag between the date of occurrence and the conclusion of the trial and undue delay in the trial of the case will contribute to the poor health of the accused/applicant.
>
> [30] The court has taken into consideration the overall circumstances of the case and the nature of the case. Having said all of the above, the court believes that the primary objective of the provisions providing for the bail should not be to detain and arrest an accused person but to ensure her appearance at the time of trial and to make sure if the accused is held guilty, she is available to suffer the consequence of the offence as such committed, in terms of punishment in accordance with the law. It would be unjust and unfair to deprive the alleged accused of her liberty during the pendency of the criminal proceeding against her, especially when the proviso of sub-s 388(1) allows in this case, the aged person and a woman with a health issue to be granted bail.

[88] Semasa hujahan lisan En Abdul Ghafar Ab Latif memaklumkan kepada mahkamah bahawa rayuan telah dikemukakan kepada Mahkamah Rayuan

terhadap keputusan kes *Puan Saad* tersebut namun demikian ia tidak diteruskan ekoran daripada keputusan untuk mempertimbangkan semula pertuduhan asal kepada Puan Saad tersebut.

[89] Dalam hal ini mahkamah berpendapat bahawa terdapat perbezaan di antara s 41B ADB 1952 dengan s 388 KTJ. Perbezaan tersebut ialah:

(a) s 39B dibaca bersama dengan s 41B adalah satu kesalahan tidak boleh jamin (*unbailable*). Sebaliknya kesalahan yang boleh diberikan jaminan di bawah s 388 KTJ adalah kesalahan-kesalahan yang tidak boleh jamin (*non-bailable*). Dalam erti kata lain bagi kesalahan *non-bailable* sekiranya terdapat keadaan-keadaan seperti yang diperincikan di bawah proviso s 388(1) KTJ seperti berikut:

> 388 When person accused of non-bailable offence may be released on bail
>
> (1) When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court, he may be released on bail by the officer in charge of the police district or by that Court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:
>
> *Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.*

Bagi maksud s 388(1) KTJ ini sekiranya terdapat keterangan yang ditunjukkan bahawa seseorang itu adalah di bawah 16 tahun atau seorang wanita atau seorang yang sakit atau uzur maka mahkamah boleh mempertimbangkan bagi membenarkan jaminan. Hal inilah yang berlaku misalnya dalam kes *Public Prosecutor v Dato' Balwant Singh (No 1)* [2002] 4 MLJ 427; [2002] 4 CLJ 155.

(b) s 41B ADB 1952 tiada peruntukan proviso seperti di dalam s 388(1) KTJ. Ia memberi kefahaman bahawa kesalahan-kesalahan yang diperincikan di bawah s 41B tersebut tidak boleh langsung diberikan jaminan oleh mahkamah. Ia adalah di dalam wewenang dan kebijaksanaan badan penggubal undang-undang memperkenalkan undang-undang tersebut.

[90] Seterusnya jika diteliti kepada s 13 Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 terdapat peruntukan yang seakan sama dengan s 388 KTJ iaitu keadaan di mana mahkamah boleh menimbangkan jaminan ditawarkan. Ia dapat dilihat dapat berikut:

> 13 Bail

(1) Bail shall not be granted to a person who has been charged with a security offence

(2) *Notwithstanding subsection (1)* —

(a) *a person below the age of eighteen years*;

(b) *a woman*; or

(c) *a sick or an infirm person*,

charged with a security offence, other than an offence under Chapter VIA of the Penal Code [Act 574] and the Special Measures Against Terrorism in Foreign Countries Act 2015 [Act 770], may be released on bail subject to an application by the Public Prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code.

[91] Mahkamah berpendapat perbezaan di antara s 41B ADB 1952 dengan s 388 KTJ dan s 13 SOSMA yang mempunyai proviso menyebabkan mahkamah tidak boleh membenarkan jaminan dan mempunyai pandangan yang berbeda dengan keputusan di dalam kes *Puan Saad*. Mahkamah ini berpendapat bahawa bagi pertuduhan di bawah s 39B ADB 1952, s 388 KTJ tidak boleh digunakan dalam mempertimbangkan jaminan dan s 41B ADB 1952 mengatasi peruntukan di bawah s 388 KTJ tersebut.

[92] Peguam pemohon telah membuat satu hujahan bersifat manusiawi apabila menyatakan bahawa mahkamah perlu mengambil perhatian bahawa keadaan kesihatan dan umur pemohon perlu dipertimbangkan untuk diberikan jaminan. Peruntukan s 41B ADB 1952 ini seolah-olah menguris perasaan mahkamah untuk tidak memberikan jaminan berdasarkan kepada perikemanusiaan. Walau bagaimanapun mahkamah di dalam mentafsirkan undang-undang perlu membuang jauh emosi daripada mempengaruhi keputusan mahkamah. Sebaliknya mahkamah perlu mengambil kira peruntukan undang-undang dan keterangan yang dikemukakan di mahkamah. Pertimbangan emosi kemanusiaan yang bercanggah dengan undang-undang tidak boleh dijadikan sandaran untuk sesuatu keputusan di dalam kes ini.

[93] Sesungguhnya mahkamah perlu memutuskan sesuatu kes berdasarkan kepada prinsip undang-undang dan sumpah jawatan hakim untuk memelihara kepentingan keadilan dan kedaulatan Perlembagaan.

KESIMPULAN

[94] Berdasarkan kepada hujahan pemohon dan responden serta afidavit-afidavit yang difailkan, mahkamah memutuskan seperti berikut:

A (a) s 41B ADB 1952 adalah berperlembagaan dan tidak bercanggah dengan Perlembagaan Persekutuan; dan

(b) mahkamah tidak membenarkan permohonan jaminan kepada pemohon.

B **[95]** Akhirnya notis usul pemohon adalah ditolak.

Notis usul pemohon-pemohon ditolak.

C Dilaporkan oleh Nabilah Syahida Abdullah Salleh

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